IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-4891

CITY OF WILLCOX AND
ARIZONA ELECTRIC POWER COOPERATIVE, INC.
Petitioners,

v.

FEDERAL POWER COMMISSION
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc. (AEPCO) pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 30, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals in *City of Willcox and Arizona Electric Power Cooperative, Inc., et al. v. Federal Power*

Commission, not yet reported, appears as Appendix A to this petition. The principal order of the Federal Power Commission (FPC), Opinion No. 697 issued June 14, 1974 (Appendix C) and its order denying rehearing, Opinion No. 697-A, issued December 19, 1974 (Appendix D), are reported at 51 FPC 2053 and 52 FPC 1876, respectively.

JURISDICTION

The opinion of the Court of Appeals was entered on June 30, 1977. Timely petitions for rehearing were denied by Order dated August 18, 1977 (Appendix B). This petition for certiorari is filed within 90 days of June 30, 1977, the date upon which the Court below issued its mandate. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b).

STATUTES INVOLVED

The statutory provisions germane to the decision of this case are Sections 4, 5 and 19 of the Natural Gas Act, 15 U.S.C. §§717(c), 717(d) and 717(r). These statutory provisions are set forth in full as Appendices E, F, and G, respectively.

QUESTIONS PRESENTED

1. Whether the FPC denied due process of law, violated Sections 4 and 5 of the Natural Gas Act, made findings unsupported by any record evidence and stated reasons which failed to justify its action in authorizing El Paso Natural Gas Company (El Paso) to allocate its inadequate gas supplies among its customers on the basis of unverified "nominations" of requirements in each of five hierarchical "end-use" priorities?

2. Whether the FPC denied due process of law, violated Sections 4 and 5 of the Natural Gas Act, and stated reasons which failed to justify its action in requiring all electric utility and industrial boiler fuel use of natural gas to be cut-off completely before any curtailment is imposed on other industrial users who also can burn fuel oil or coal, and in abrogating the superior contractual rights of firm industrial users over interruptible users in each priority?

STATEMENT OF THE CASE

This petition challenges the failure of the United States Court of Appeals for the District of Columbia Circuit to reverse FPC orders which completely invert preexisting contractual service priorities, allocate El Paso's inadequate gas supply among its customers on a basis which permits them to "nominate" more gas in the higher priorities than they require, and compels boiler fuel customers to absorb, in the first instance and predominantly, the entire burden of curtailment on this pipeline system. This inversion of curtailment priorities is extremely costly to the ultimate consumers of the electricity generated by Arizona Electric Power Cooperative, Inc. and to the residents of the City of Willcox.[1]

El Paso is an interstate gas pipeline serving customers in California and in several states east-of-California. Willcox is a city buying gas for its own use and other gas for resale to Arizona Electric Power Cooperative, Inc., which is a rural, non-profit

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[1]On a comparable thermal energy basis, measured by per million BTU, AEPCO's cost for natural gas is $.934 and its cost for fuel oil is $2.768. Thus, AEPCO incurs an additional cost of $1.717 per Mcf of curtailed gas volumes. The data upon which these calculations are based is derived from the "March, 1977 Report on Fuel Cost and Quality", issued by the FPC in Press Release No. 23305, August 1, 1977.

electric cooperative association engaged in the generation and transmission of electrical power sold, on a firm basis, to four other REA cooperatives which are totally dependent upon it (R. 1823, 4089). Over 65% of the electricity sold by the cooperative is for residential and commercial consumption (R. 7091, 8323). Willcox obtains its entire gas supply from El Paso and cannot purchase gas elsewhere.

Willcox buys firm gas from El Paso and sells firm gas to the cooperative under a contract extending from March 31, 1970 to December 31, 1983. These long-term contractual arrangements are geared to the firm daily quantity of gas required to operate a 98.5 megawatt combined cycle gas and steam turbine generating unit under full load conditions on an economical basis (R.7084). This plant was designed to burn only natural gas and built and financed in reliance upon firm contractual delivery rights. When curtailed, it burns only diesel fuel, the lightest, purest and most expensive grade of fuel oil. It cannot burn any other fuels.

The FPC proceeding in which the challenged orders were issued was initiated by El Paso's July 6, 1971 tariff filing which proposed to modify its plan prescribing priorities of service during curtailment. For over 20 years, El Paso's customers had operated without complaint under tariffs which differentiated only between residential, commercial, and industrial use, and which treated all industrial use alike, except for the subordination of interruptible to firm customers and of direct to resale customers (R.246; 248; 249; 377; 241-42; 346; 9,781; 7,744; 7,816; R.16,590, note 3; R.10,802-03; 10,838; 10,713-11,264). El Paso's 1971 tariff proposal was cast in the same mold. It allocated the pipeline's capacity entirely on the basis of historical takes and contract rights. Hearings were held only in the context of El Paso's tariff proposals and the then-conventional framework of inquiry governing curtailment proceedings, which did not contemplate a hierarchy of service priorities within the industrial

use class. No agency notice in this case even intimated that steam generating boiler fuel use might be cutoff ahead of all other industrial uses. No party to the permanent curtailment proceeding ever proposed such a drastic reordering of existing curtailment delivery priorities.

Hearings were concluded and briefs on the so-called "permanent curtailment plan" were filed with the Administrative Law Judge on July 21, 1972. El Paso, however, withdrew its tariff filing on August 17, 1972 and asked the FPC to prescribe a new short-term interim curtailment plan to meet the "emergency" (R.11,928-70). Acting under Section 5 of the Act, the FPC granted that motion and ordered the record reopened for the *sole purpose* of receiving evidence on the need for an interim emergency plan[2] (R.12, 225-29.) Reopened hearings were held on this limited issue, and initial and reply briefs were filed on October 3 and October 10, 1972.

On October 31, 1972, the FPC prescribed a five step "end-use" curtailment plan which subordinated boiler fuel use to all other industrial use (R.13,355-68.) This change in El Paso's curtailment plan was *not* necessary to protect residential or commercial users since they already enjoyed a complete priority in deliveries over all industrial users (R.9781; 7744, 7816.) Nor did the subordination of boiler fuel uses to other industrial uses afford *any* economic benefits to residential or commercial gas users. On the contrary, this policy imposes the ultimate cost of purchasing higher priced substitute fuels upon the residential and commercial consumers of electricity—who are also the residential and commercial consumers of gas. In other words, the electric utility or industrial firm does not pay its own fuel bill. Rather, it passes this cost on to the ultimate consumers of the electricity it generates or the product it manufactures. Thus, this

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[2]That limited record is now being used by the agency and the Court below to support the subordination of boiler fuel.

new FPC "end use" policy benefits only the industrial concern which uses gas for heat, or for power in a process other than steam generation.

In prescribing this interim plan, the agency disclaimed any intent to rule upon the merits of the permanent plan (R. 13, 664, 13, 360). The plan was to be effective only until October 31, 1973, unless earlier terminated by agency approval of a permanent plan. During the life of the interim plan, proceedings directed toward the formulation of a permanent plan continued.

But, on January 8, 1973, before the Administrative Law Judge rendered an initial decision, the agency issued Order No. 467 in Docket R-469. This statement of policy fixed a uniform hierarchy of curtailment-related service priorities for all interstate pipelines. *In almost all respects, these priorities were identical to those adopted on October 31, 1972 in the short-term, interim, "emergency" plan for El Paso.*[3] Thus, boiler fuel was *permanently* subordinated to all other industrial uses, although no such proposal was ever made in the permanent plan hearings.

On June 14, 1974, the FPC issued Opinion 697 prescribing a permanent curtailment plan for El Paso's system identical to the interim emergency plan except for one minor change which conformed those priorities to Order No. 467.[4]

Thus, there was no notice and can be no record evidence, on the "end-use" factors which the FPC made the sole basis for its radical changes in El Paso's preexisting contracts and tariffs. AEPCO believed that it was unfair for the FPC to render a final adverse decision without any notice or without affording it the

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[3]Except that it subordinated interruptible customers in a Priority 5B.

[4]Thus, a special Priority 2 was given for storage injection gas.

opportunity to submit record evidence. Therefore, AEPCO requested a reopening of the record so that evidence might be taken on the matters first introduced in the agency's final decision (R. 16,953). This request was denied by Opinion 697-A (Appendix D).

Accordingly, AEPCO filed a timely petition for review with the United States Court of Appeals for the District of Columbia Circuit. That Court ruled in its favor on certain of the issues discussed in its opinion (Appendix A), i.e., fuel storage, pp. 34-38 and turbine fuel, pp. 24-25, but rejected its claim for equality of curtailment for boiler fuel and other industrial fuel use (pp. 20-23). It also rejected the claim that the FPC's end-use curtailment plan based on a hierarchy of priority end-uses among industrial customers could only be fairly administered on the basis of actual data showing past historic end-use in each priority (pp. 52-55). This latter ruling sanctioned the permission granted by the FPC to El Paso to administer its curtailment plan solely on the basis of self-serving customer "nominations" of requirements in each priority.

REASONS FOR GRANTING THE WRIT

I. END-USE DATA

1. This petition raises issues of first impression and exceptional importance. The Court of Appeals decision here on the issue of whether the FPC is legally obliged to compel interstate pipelines to collect data on the actual end-use requirements of their customers, and to verify such data, is of *transcendent* importance to the administration of the Natural Gas Act and will affect every pending and future curtailment case.

2. The overstatement of high priority requirements by customers to the pipeline or distributor suppliers *creates*

fictitious shortages in Priority 1 and 2. During a period when there is a shortage of natural gas, such overstatement of high priority requirements endangers *true* residential and small commercial customers not able to convert to other fuels by diverting high priority gas to low priority use. This is plainly *not* in the public interest.

Furthermore, the adverse impact is not limited just to that interstate pipeline system whose customers have overstated their higher priority requirements. The United States has not seen the last period of acute natural gas shortages such as those which occurred in the 1976-77 winter. During such periods, pipelines with less severe shortages assist pipelines with greater deficiencies by selling them surplus gas or gas earmarked for low priority use. Any toleration by the Courts or the FPC of overstatement of high priority needs on one pipeline system clearly and directly impairs the ability of that pipeline to supply gas to other pipelines which are actually suffering more severe curtailment.

3. Until this case, the uniform practice of pipelines in curtailment was to collect *end-use data* from their customers *and to themselves police such data.* Many pipelines formed so-called Data Verification Committees which, while not an adequate substitute for adversary hearing procedures, were better than El Paso's complete refusal to gather actual data, or in some way investigate and verify the accuracy of its customers' priority classifications.

4. The FPC recognized that *both* end-use data and an assessment of impact were essential to the implementation of the five priority end-use curtailment plan it prescribed for another pipeline. Thus, in an order issued November 30, 1973, in *United Gas Pipe Line Co.*, Docket Nos. RP71-29, *et al.* the FPC postponed the implementation of a plan virtually identical[5] to the

[5]Except that it subordinated interruptible customers in a Priority 5B.

plan prescribed here because of the lack of such data. Furthermore, a reversal of the FPC's action in making Opinion 697 and 697-A effective without any end-use data would result in restoration of the preexisting El Paso contract and tariff curtailment plan. *That plan is an end-use plan affording the first and second highest priority to residential and commercial customers and to those industrial consumers who use gas for purposes for which fuel oil or coal are not readily available substitutes.*[6] Thus, the situation in this proceeding parallels the situation in the *United* proceeding where the FPC's action in vacating its order prescribing the five-step plan restored a similar three step plan. The FPC there stated:

> We note that United's three-priority plan now in effect is an end-use plan. We can, therefore, permit its use temporarily without impairment of our decision to require, nationally, curtailment to be based on end-use considerations. Our action here should not, therefore, be confused with those situations where we have refused to allow a continuation of ratable curtailment plans not based on end-use considerations. [Slip Op., p. 5].[7]

5. The Court of Appeals recognized that if the FPC had authorized El Paso to assign end-use priority classifications to particular customer requirements *without any data,* its action would have constituted reversible error (App. A, p. 53). Unfortunately, the Court was unaware that El Paso had been given a specific license to do just this.

[6]The latter feature results from the FPC's action in prescribing a Priority 2 for industrial feedstock, plant protection and process gas, which was agreed to by all parties and has now become a final and nonappealable element of any El Paso curtailment plan.

[7]Ratable curtailment plans are those where the same system average curtailment percentage is imposed on each customer.

Every curtailment plan limits each customer to a so-called "quantity entitlement" which is the volume of gas taken in a specific pre-curtailment "base year". This prevents attachments of new requirements by some customers to the detriment of those customers who adhere to this service moratorium. "End-use data" means the *actual* gas volumes consumed at the burner tip by an individual customer in each of the different end-use priorities. This is actual end-use data of the type necessary to preserve the lawfulness of any end-use curtailment plan and there is *no* other kind of end-use data.

El Paso however has substituted customer *"nominations"*, i.e., customer requests for gas in each curtailment priority for end-use data. Thus, "wishes" have been substituted for "facts". No customer can distort end-use data on the volume of gas actually burned in a past period. But, every customer can "nominate" more high priority gas than it actually has ever used, or now needs. The accuracy of end-use data can be verified by resorting to historic facts, but it is impossible to verify "nominations" by any method. The temptation for gas distributors and direct industrial customers to overstate their gas requirements is so compelling that *it is the rule, not the exception.* This Court may judicially notice the position taken on this very issue by the FPC's Staff Counsel in the *United Gas Pipe Line Company* curtailment case, Docket RP71-29 *et al.*, Phase II. There, the Staff challenged Priority 2 process gas requirements and "questioned the validity of more than 90 percent of the direct market process [gas] entitlements allocated by United." [8]

Thus, the Court of Appeals has inadvertently legalized the arbitrary, capricious and unreasonable scheme of administering a curtailment plan which it expressly found would be illegal.

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[8]Ftn. 125, p. 41, Staff Initial Brief, filed February 18, 1977.

6. The holdings of the Court of Appeals that the FPC's findings on end-use data *can be sustained by presumptions and need not be supported by evidence* (App. A, p. 53) is plainly in conflict with the unbroken succession of cases in this Court holding that an administrative agency must base its findings of fact upon evidence of record, and that nothing can be treated as evidence which is not introduced as such. *Morgan v. United States*, 298 U.S. 469, 480; *United States v. Abilene and S. R. Co.*, 265 U.S. 274.

Therefore, the assignment of end-uses to priorities here cannot constitutionally be based upon a complete disregard of the rules of evidence and mere administrative fiat. This Court has specifically condemned claims to such authority by administrative agencies as a deprivation of statutory fair hearing and due process of law. *Interstate Commerce Commission v. Louisville and Nashville Railroad Co.*, 227 U.S. 88, 90-93. Likewise, in *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 291, 300-305, this Court struck down a state regulatory commission's action in basing findings upon facts officially noticed, without any opportunity to cross-examine and present rebuttal evidence, as "condemnation without trial" rather than "the fair hearing essential to due process" (*Id.*, at 300). It is vital to note that this Court insisted that quasi-judicial proceedings be conducted in full compliance with the "inexorable safeguard" of a fair and open hearing, stating in words particularly pertinent here:

> There can be no compromise on the footing of *convenience* or *expedience*, or because of a natural desire to be rid of harrassing delay when that minimal requirement has been neglected or ignored. [Emphasis added.]

7. There is no factual basis in the record to support the Court's view that collection and testing of actual end-use data

would be a burden. That collection would involve sending to each ultimate consumer and to each distributor one "fill-in-the-blank" questionnaire. If obtaining end-use data is so burdensome, why has it been possible to collect it in other FPC pipeline proceedings and in much more comprehensive Federal Energy Administrastion questionnaires? [9]

8. The Court's argument that AEPCO must demonstrate *specific* errors in the data before it is entitled to a hearing is clearly without merit. For, by definition, AEPCO can only offer such proof *after*, not *before*, end-use data is first collected and it is afforded the right to cross-examine and present rebuttal evidence. The Court has unlawfully shifted the burden of proof from the FPC, which is the proponent of the lawfulness of the permanent plan and its administration, to AEPCO.

Furthermore, AEPCO has shown specific and major defects in El Paso's so-called "data". For example, other pipelines which have collected end-use data show usage in *each of the separate subpriorities* of every priority, but El Paso has asked its customers to furnish nominations only for the *total in each priority*. This fundamental flaw further impairs the already limited value of these "nominations" because each priority includes several distinct and unrelated elements. Thus, Priority 2 encompasses large commercial use, industrial plant protection use, industrial feedstock use, industrial process gas use and customer injections of gas into storage.

9. Apart from constitutional rights, Sections 4 and 5 of the Natural Gas Act afford AEPCO the right to a full adjudicatory hearing. The FPC applied this well settled doctrine to end-use data in its Order [10] in the *United* curtailment case, Docket RP71-29, *et al.* The Court of Appeals plainly erred in accepting the

[9]FEA Form G101-Q00.

[10]Issued November 30, 1973.

FPC's efforts to distinguish *United* on the ground that in that proceeding many complaints were made and here only AEPCO complained. Certainly, the lawfulness of an administrative agency's action cannot be determined by counting noses and this novel test is surely no answer to our claim of denial of due process rights. In any event, gas distributor customers of El Paso who benefit from exaggerating their own high priority requirements are not likely to complain and only low priority customers such as AEPCO, who thereby lose gas, will protest. Nor is there any merit to the Court's claim that there was more "relative novelty" to the El Paso five step plan than to the United five step plan (App. A, p. 53). As we have already observed, infra, p. 9, in each case, the difference between the preexisting curtailment plan and the new proposed plan are nil.

II. BOILER FUEL USE AND ABROGATION OF CONTRACT RIGHTS

1. The decision of the Court below sustains the FPC's antiboiler fuel policy although no evidentiary hearings were held to evaluate the fairness of this policy or its economic consequences which are to impose a hidden tax of many millions of dollars each year upon the residential and small commercial consumers of electricity. *Clearly, the legal issue presented here is one which has an immediate and substantial dollar impact upon every citizen of the United States.* The FPC projects that 1977-78 winter season curtailments will rise to 22.8% of the total nationwide gas requirements served by interstate pipelines. [11] The cost of replacing this vast quantity of gas with an equivalent

[11]"Comparison of Actual (1976-77) and Projected (1977-78) Interstate Pipeline Natural Gas Firm Deliveries, Firm Curtailments, and Firm Requirements By States, for Winter Period November through March" issued by the Federal Power Commission in Press Release 23391, September 16, 1977.

quanity of fuel oil is $1,689,000,000 [12], to be borne primarily by residential and small commercial consumers of electricity through automatic increases in electric rates. Even greater curtailments in future years will further increase this cost. The FPC's policy is clearly wrong and completely adverse to the public interest.

While this FPC policy compels boiler fuel users to absorb all curtailment on their pipeline system in the first instance, that burden is shared by non-boiler fuel industrial users when the deficiencies become so severe that curtailment of the preferred higher priority is needed. The key point is that boiler fuel users have been compelled by the FPC to shoulder more than their fair share of such curtailment. Even during the summer season when gas for lower priority use is relatively abundant, the boiler fuel users may still be completely cut-off.

The FPC's anti-boiler fuel policy cuts off gas service to any customer of an interstate pipeline using natural gas to generate electricity, or to raise steam for industrial purposes, while continuing service to other industrial users who are *equally able to burn fuel oil or coal as substitute fuels* (R. 1453, 1465, 1475, 8277). The FPC does not deny that industrial gas users who use gas for non-boiler fuel purposes are able to use other fuels (R.16,605) but claims only that "alternate fuels could be more easily substituted for natural gas in boiler fuel applications than in other applications" (*Id.*). Even if true, this fact plainly does not justify relieving the nonboiler fuel industrial user of a fair share of the economic burden of the nationwide gas shortage. In any event, the Court of Appeals rejected this first finding advanced by the FPC to support the subordination of boiler fuel for lack of record evidence (App. A, p. A-21).

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[12]These incremental costs are based on the prices paid for such substitute fuels by electric utilities, which generally pay slightly less than other industrial consumers.

The FPC's curtailment policy gives residential and commercial consumers of natural gas a priority over industrial users. But, this policy inconsistently imposes the highest cost burden upon residential and commercial consumers of electricity, who should be entitled to the same consideration and treatment as direct users of gas. Although the FPC recognizes the superior public and social interest of *residential* and *commercial* gas consumers, it has unrealistically treated the same type of consumers of electricity generated by gas as *industrial consumers.* In reality, they are the same consumers. The FPC mistakenly limited its consideration entirely and exclusively to one isolated factor, i.e., the ability of the direct gas consumer to use substitute fuels, while ignoring all other factors.

Again, without any evidentiary support, the FPC has ordered a transfer of funds from the pockets of industrial consumers of electricity to those of industrial consumers of natural gas. In some instances, the industrial gas user is able to pass on the higher cost of substitute fuels, while the industrial consumer of electricity is unable to raise its prices. In some instances, fuel costs are a small and unimportant factor in the costs of an industrial gas user, while the power costs incurred by the industrial consumer of electricity may be a very large portion of its total costs. Nevertheless, the FPC automatically prefers the industrial gas user in every case. Yet, the FPC has neither made an inquiry into these matters nor afforded the parties adversely affected the opportunity to present any evidence. AEPCO respectfully submits that the FPC should be compelled to hear evidence on these highly relevant issues as to both human needs and industrial electricity users.

2. The Court of Appeals unlawfully disregarded AEPCO's statutory right to retain the contractual preference of a firm customer over interruptible customers. These rights arise from the terms of relevant contracts and tariffs. AEPCO's contractual entitlement affords it a delivery preference during curtailments

over El Paso's own direct sale industrial customers and over the interruptible industrial customers served by California distributors (R. 9781).

The Court upheld the validity of such contract rights *vis a vis* customer requirements in the same priority (App. A, pp. 47-50), but eliminated the right to receive firm deliveries in lower priorities over interruptible deliveries in higher priorities.

In this respect, the Court's decision is squarely in conflict with two recent decisions of the Court of Appeals for the Fifth Circuit in, respectively, *State of Louisiana v. FPC*, 503 F.2d 844, 861 (1974) and *Louisiana Power and Light Company v. FPC*, 526 F.2d 898, 905-907 (1976). In both these decisions, that Court carefully distinguished between the evidence necessary to subordinate boiler fuel and that required to overturn a contractual curtailment priority. Thus, in *State of Louisiana*, it found that there was sufficient evidence to relegate boiler fuel to an inferior status (p. 860) but that a remand of the record was required because the agency had failed to support its finding that the contractual preference provided by a four priority plan was unlawful because it violated Section 4(b) of the Act (p. 861).

3. The decision of the Court of Appeals unlawfully sustains the FPC's anti-boiler fuel policy by changing the agency's findings of fact and its policy rationales. This decision by the Court below squarely conflicts with the decision of this Court in *Securities & Exchange Commission v. Chenery Corporation*, 318 U.S. 80, 87-95 (1942). Chenery restricts a reviewing Court to consideration of the precise grounds relied upon by the agency and prohibits affirmance on any other grounds, which might have been, but were not adopted.

The FPC curtailment plan subordinated boiler fuel to all other industrial use of gas for three reasons, the first of which the Court rejected. The second reason is a more economical and

efficient control of pollution. The Court correctly found that this advantage stemmed from an "efficiencies of scale" concept which is based *only on differences in size* between one gas appliance and other such appliance (R. 7052-53). Witness Markus recognized this, and advocated a *census* of boilers based on size so that curtailments could be imposed first on the largest units and last upon the smallest unit (R. 7054-55). *The FPC rejected this "efficiency of scale" concept, and based curtailments upon the aggregate volume of boiler and non-boiler gas usage in each priority, at an individual plant location* (R. 16,605-06). No census of relative size of boiler fuel and non-boiler fuel appliances has ever been taken. The Court of Appeals cannot lawfully sustain an agency's action by changing its findings of fact and its policy determinations.

In addition, the Court sustained the FPC's second and third rationales *entirely* on the mistaken view that relative size of gas usage at each plant location was the dividing line between Priority 3 on the one hand, and Priorities 4, and 5, on the other hand. But, by definition, a Priority 3 non-boiler fuel industrial user taking more gas each day than a Priority 4 or 5 boiler fuel user enjoys a higher priority. Again, the Court changed the FPC's rationale and invaded its province.

4. The Court of Appeals decision upholding the FPC's antiboiler fuel policy conflicts with this Court's many decisions guaranteeing parties to administrative agency proceedings the right to know the claims of opposing parties and to present appropriate rebuttal evidence (e.g., *Morgan v. United States*, 304 U.S. 1, 18). Here, the FPC held hearings on the short term, interim curtailment plan which it advised parties would be limited in scope to the provisions and one year term of that plan (R. 12,225-229). In addition, the Administrative Law Judge struck from the record all testimony and exhibits relating to any period beyond that year (R. 8236-39). Its subsequent reliance on that record eviscerates the right to cross-examine and present

rebuttal evidence and is, therefore, clearly unconstitutional (*Rodale Press, Inc. v. FPC*, 132 U.S. App. D.C. 312, ____, 407 F.2d 1252, 1256-57, 1258 (D.C. Cir. 1968).

The Court of Appeals decision is also squarely in conflict with the decision of the Sixth Circuit in *N.L.R.B. v. Johnson*, 322 F.2d 216, 220 (1963) cert. denied, 376 U.S. 951 (1964). *Johnson* held that after an agency hearing examiner had given assurances that evidence was admitted for one specific purpose, it was improper to use that evidence for a different purpose. This is precisely what the FPC has done here. The *only* evidence in support of the FPC's second and third justifications for its boiler fuel policy is found in the hearing record of the short term, interim, emergency curtailment plan. Thus, the Court below relied upon evidence offered by witness Markus in connection with the *interim* plan to sustain the FPC's second and third rationales for the *permanent* curtailment plan. Indeed, the Court referred specifically only to transcript pages 7050-53 and 7062, which is the Markus interim plan testimony. The Court generally intimates that other testimony was cited by the FPC, but that agency relied on only *two pages* of the permanent plan transcript. At R. 1838, a witness advocated the subordination of electric utility use only to *process use* and not to all other industrial use (R. 1837-38). At R.4364, a witness testified that non-boiler fuel users in Priority 3 could not use *residual fuel oil*. This implicitly concedes that they could use lighter grades of fuel oil, such as diesel oil. In any event, both of these citations bear only upon the FPC's first rationale, which was completely rejected by the Court.

5. The Court below erred in relying on the FPC's pollution control rationale. *The Priority 3 customers to whom the boiler fuel customers were subordinated have already fully converted to oil burning appliances and thus will not realize the alleged economies of pollution control.* Furthermore, the Johns-Manville witnesses relied upon by the FPC and the Court admitted that

their pollution control economies were valid only for the short life of the interim emergency curtailment plan and that, in the long run, all industrial users could install alternate fuel and pollution control facilities (E.g., R.1829-30, 1832, 1837 (Truax); R.7059 (Goldfield); R. 8280, 8288-89 (Markus)).

The Court below and the FPC have made an overly simplistic analysis restricted to the single factor of economies in pollution control. They have ignored the many other and equally relevant factors in balancing the anti-boiler fuel factors and countervailing factors. The latter factors include, among others, elimination of discrimination against residential, commercial and industrial electricity users in favor of their gas burning counterparts, the social benefits of fairer and lower electric rates versus the less crucial prices of industrial products, the good faith and reasonable reliance by boiler fuel users on firm supplies of naural gas which caused them to build plants unable to burn abundant and cheaper alternate fuels such as coal, and the need to use gas for boiler fuel in power plants located in metropolitan areas to minimize air pollution, e.g., *Transcontinental Gas Pipeline*, 38 FPC 906 (1967). In *American Smelting and Refining Co., v. FPC*. 161 App. D.C. 6, 494 F.2d 925 (1974), cert. denied, 419 U.S. 882, 945-946, the Court of Appeals insisted that the agency perform exactly such a balancing process when it reversed the FPC's finding that boiler fuel was *per se* inferior to all other industrial uses.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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September 28, 1977

APPENDICES

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2123

CITY OF WILLCOX AND ARIZONA ELECTRIC POWER COOPERATIVE, INC., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

SAN DIEGO GAS & ELECTRIC CO.
AMERICAN SMELTING AND REFINING CO., ET AL.
SOUTHERN UNION GAS CO.
GENERAL MOTORS CORPORATION
EL PASO NATURAL GAS CO.
NAVAJO TRIBAL UTILITY AUTHORITY
DEPARTMENT OF WATER AND POWER ETC.
THE PEOPLE OF THE STATE OF CALIFORNIA, ETC.
TUCSON GAS & ELECTRIC CO.
PACIFIC GAS & ELECTRIC CO.
NEVADA POWER COMPANY
SOUTHWEST GAS CORPORATION
SOUTHWEST NATURAL GAS CONSUMERS
ARIZONA FUEL USERS ASSOCIATION
PIONEER NATURAL GAS CO., INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

No. 75-1019

ARIZONA PUBLIC SERVICE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

SAN DIEGO GAS & ELECTRIC CO.
CITY OF WILLCOX, ARIZONA AND ARIZONA ELECTRIC POWER COOP., INC.
AMERICAN SMELTING AND REFINING CO., ET AL.
SOUTHERN UNION GAS CO.
NAVAJO TRIBAL UTILITY AUTHORITY
GENERAL MOTORS CORPORATION
TUCSON GAS & ELECTRIC CO.
PACIFIC GAS & ELECTRIC CO.
SOUTHERN CALIFORNIA EDISON CO.
EL PASO NATURAL GAS CO.
PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
NEVADA POWER COMPANY
SOUTHERN CALIFORNIA GAS CO.
SOUTHWEST NATURAL GAS CONSUMERS
SOUTHWEST GAS CORPORATION
ARIZONA FUEL USERS ASSO.
PIONEER NATURAL GAS CO., INTERVENORS

No. 75-1062

NEVADA POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

AMERICAN SMELTING & REFINING CO., ET AL.
GENERAL MOTORS CORP.
TUCSON GAS & ELECTRIC CO.
SOUTHERN CALIFORNIA GAS CO.
SAN DIEGO GAS & ELECTRIC CO.
PACIFIC GAS & ELECTRIC CO.
CITY OF WILLCOX ARIZONA AND ARIZONA ELECTRIC POWER COOP., INC.
NAVAJO TRIBAL UTILITY AUTHORITY
PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
EL PASO NATURAL GAS CO.
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT
SOUTHWEST GAS CORP.
SOUTHERN UNION GAS CO.
SOUTHERN CALIFORNIA EDISON CO.
SOUTHWEST NATURAL GAS CONSUMERS
ARIZONA FUEL USERS ASSO.
PIONEER NATURAL GAS CO., INTERVENORS

No. 75-1245

PACIFIC GAS AND ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

SOUTHERN UNION GAS CO.
CITY OF WILLCOX ARIZONA, ET AL.
NAVAJO TRIBAL UTILITY AUTHORITY
AMERICAN SMELTING AND REFINING CO., ET AL.
SOUTHWEST GAS CORP.
THE PEOPLE OF THE STATE OF CALIFORNIA, ET AL.
EL PASO NATURAL GAS CO.
GENERAL MOTORS CORPORATION

SOUTHERN CALIFORNIA EDISON COMPANY
ARIZONA PUBLIC SERVICE CO.
NEVADA POWER CO.
TUCSON GAS AND ELECTRIC CO., INTERVENORS

No. 75-1246

SAN DIEGO GAS & ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

SOUTHERN UNION GAS CO.
CITY OF WILLCOX, ETC.
PEOPLE OF THE STATE OF CALIFORNIA, ET AL.
GENERAL MOTORS CORPORATION
PACIFIC GAS & ELECTRIC CO.
NAVAJO TRIBAL UTILITY AUTHORITY
EL PASO NATURAL GAS CO.
SOUTHWEST GAS CORP.
SOUTHERN CALIFORNIA EDISON CO.
NEVADA POWER COMPANY
AMERICAN SMELTING AND REFINING CO., ET AL.
ARIZONA PUBLIC SERVICE CO.
TUCSON GAS & ELECTRIC CO.
SOUTHWEST NATURAL GAS CONSUMERS
ARIZONA FUEL USERS ASSOCIATION
PIONEER NATURAL GAS CO., INTERVENORS

No. 75-1247

SOUTHERN CALIFORNIA GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

SAN DIEGO GAS, ET AL.
SOUTHERN UNION GAS CO.
CITY OF WILLCOX, ETC.
DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES
THE PEOPLE OF THE STATE OF CALIFORNIA, ET AL.
PACIFIC GAS AND ELECTRIC CO.
NAVAJO TRIBAL UTILITY AUTHORITY
EL PASO NATURAL GAS CO.
GENERAL MOTORS CORPORATION
SOUTHERN CALIFORNIA EDISON CO.
AMERICAN SMELTING AND REFINING CO.
ARIZONA PUBLIC SERVICE CO.
SOUTHWEST GAS CORP.
NEVADA POWER COMPANY
TUCSON GAS & ELECTRIC CO.
SOUTHWEST NATURAL GAS CONSUMERS
ARIZONA FUEL USERS ASSO.
PIONEER NATURAL GAS CO., INTERVENORS

No. 75-1248

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

NEVADA POWER CO.
EL PASO NATURAL GAS CO.
THE PEOPLE OF THE STATE OF CALIFORNIA, ET AL.
SAN DIEGO GAS AND ELECTRIC CO.
AMERICAN SMELTING AND REFINING CO., ET AL.
NAVAJO TRIBAL UTILITY AUTHORITY
PACIFIC GAS AND ELECTRIC CO.
TUCSON GAS AND ELECTRIC CO.
SOUTHWEST NATURAL GAS CONSUMERS
ARIZONA FUEL USERS ASSOCIATION
PIONEER NATURAL GAS CO., INTERVENOR

Petitions for Review of Orders of the
Federal Power Commission

Argued September 13, 1976

Decided June 30, 1977

Judgment entered this date

Arnold D. Berkeley, with whom *David R. Straus* was on the brief, for petitioner in No. 74-2123 and intervenors City of Willcox and Arizona Electric Power Cooperative.

Peyton G. Bowman, with whom *C. Floyd Mathews* was on the brief, for petitioner in No. 75-1019.

Arnold Fieldman, with whom *Reuben Goldberg* was on the brief, for petitioner in 75-1062 and intervenor Nevada Power Company.

Howard V. Golub, with whom *Malcolm H. Furbush* was on the brief, for petitioner in No. 75-1245 and intervenor Pacific Gas and Electric Co. *Daniel E. Gibson*, entered an appearance for intervenor PG&E Co.

Rollin E. Woodbury, with whom *H. Robert Barnes*, *Alan N. Nedry*, *Edward C. Farrell* and *Arthur T. Devine* were on the brief, for petitioner in No. 75-1248 and intervenors Southern California Edison Company and Department of Water and Power of the City of Los Angeles. *Frederick H. Ritts* entered an appearance for Department of Water and Power of the City of Los Angeles.

John H. Burns, Jr., Attorney, Federal Power Commission, with whom *Drexel D. Journey*, General Counsel, *Robert W. Perdue*, Deputy General Counsel, and *Allan Abbot Tuttle*, Solicitor, Federal Power Commission, were on the brief, for respondent. *George V. McHenry, Jr.*,

Solicitor, Federal Power Commission, at the time the record was filed, also entered an appearance for respondent. *Richard C. Steffey* and *William J. Grealis*, Attorneys, Federal Power Commission, entered an appearance for respondent.

C. Frank Reifsnyder, with whom *Harris S. Wood* was on the brief, for intervenor El Paso Natural Gas Company.

Edward J. Grenier, Jr., with whom *Frazer F. Hilder* was on the brief, for intervenor General Motors Corporation. *Richard J. Pierre, Jr.* and *Richard P. Noland* also entered an appearance for intervenor General Motors Corp.

Randolph W. Deutsch, with whom *Richard D. Gravelle* and *J. Calvin Simpson* were on the brief, for intervenors People of the State of California and the Public Utilities Commission of the State of California. *John S. Fick* also entered an appearance for intervenors People of the State of California and Public Utilities Commission of the State of California.

David R. Pigott was on the brief for petitioner in No. 75-1246. *Donald J. Richardson, Jr.* also entered an appearance for petitioner in No. 75-1246 and intervenor San Diego Gas and Electric Company.

Thomas D. Clarke was on the brief for petitioner in No. 75-1247 and intervenor Southern California Gas Company. *Jeffrey A. Meith* also entered an appearance for intervenor Southern California Gas Company.

Jerome Ackerman, *Bingham B. Leverich* and *Nicholas W. Fels* were on the brief for intervenors American Smelting and Refining Company, et al. *James R. McCotter* also entered an appearance for intervenors American Smelting and Refining Company, et al. *Cameron R. Graham*, *Robert J. Haggerty*, *A. S. Grenier* and *Phil W. Jordan* were on the brief for intervenors Pioneer Natural Gas Company, Southern Union Gas Company and South-

west Natural Gas Consumers. *Constance L. Howard* and *Charles H. McCrea* entered an appearance for intervenor Southwest Gas Corporation. *John T. Ketcham* entered an appearance for intervenor Pioneer Natural Gas Company.

Lawrence V. Robertson, Jr., Thomas F. Brosnan and *John F. Harrington* were on the brief for intervenor Tucson Gas and Electric Co.

Cameron R. Graham was on the brief for intervenor Southwest Natural Gas Consumers.

Richard H. Silverman was on the brief for intervenor Salt River Project, Agricultural Improvement and Power District in No. 75-1052. *Joel L. Green* entered an appearance for intervenor Salt River Project, Agricultural Improvement and Power District in No. 75-1062.

David B. Graham, filed a brief on behalf of Natural Rural Electric Cooperative Association, as *amicus curiae* urging affirmance.

Walter F. Wolf, Jr. entered an appearance for intervenor Navajo Tribal Utility Authority.

James R. Bieke entered an appearance for intervenor Arizona Fuel Users Association.

Before BAZELON, *Chief Judge*, and TAMM and MACKINNON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MACKINNON.

Opinion filed by *Chief Judge* BAZELON, concurring in part and dissenting in part.

MACKINNON, *Circuit Judge*: The natural gas shortage necessitating curtailment of deliveries on the El Paso Natural Gas System is the subject of the present appeal. Recognizing that decreasing availability would soon cause severe hardship, the Federal Power Commission issued Order No. 431 in April of 1971. By that order, all jurisdictional pipelines were required to

file new tariffs with the Commission to provide for rationing of natural gas among eventual users. El Paso complied on July 6, 1971, submitting a contingency plan that allocated scarce natural gas according to the ultimate consumers' contracts with their suppliers, and reflecting the total amounts of gas that the consumers had used in the past.

In August of 1972, after hearings had been held before the FPC, the original proposal was withdrawn. El Paso requested the FPC to issue an interim curtailment plan, to be effective until a permanent plan could issue. On October 31, 1972, the Commission released Opinion No. 634 (J.A. 315, Tr. 13355) which established an interim plan, awarding natural gas allotments to the various distributors on the basis of the eventual use to which the gas would be put. A modification followed with Opinion No. 634A (J.A. 339, Tr. 13746), issued on December 15, 1972. The challenge to this interim plan was decided in *American Smelting and Refining Co. v. FPC*, 161 U.S.App.D.C. 6, 494 F.2d 925, *cert. denied*, 419 U.S. 882 (1974) (hereinafter, *"ASARCO"*). The attack was made by many of the same petitioners here and was, in large part, sustained.

On June 14, 1974, a permanent curtailment plan was announced for the El Paso System. *See* Opinion No. 697 (J.A. 411, Tr. 16587). Once again, a supplementary opinion was required; this was issued in Opinion No. 697A on December 19, 1974 (J.A. 484, Tr. 17080). Opinion No. 697 was also an "end-use" curtailment plan. It was ordered to be treated only as an interim plan (in Opinion No. 697A), until an environmental impact statement had been completed. El Paso was required to file a set of revised tariffs in keeping with Opinions No. 697 and 697A.[1] That is the present status of the plan.

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[1] The ripeness aspects of this situation are discussed in Part VI, p. 38, *infra*.

Opinions No. 697 and 697A classify all ultimate users of natural gas into five priorities, with residential and small commercial users receiving top priority, and large volume industrial boiler users with alternate fuel capabilities receiving lowest priority.[2]

Seven petitioners now press objections to the proposed permanent curtailment plan.[3] Fifteen other parties have intervened as *amici curiae*.[4] Many conflicting objections

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[2] Subject to the modifications of Opinion No. 697A, the priorities announced by the FPC for El Paso are:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day).

Priority 2. Large commercial requirements (50 Mcf or more on a peak day), industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day) boiler-fuel use where alternate fuel capabilities can meet such requirements.

(Opinion No. 697, J.A. 424-25, Tr. 16599).

[3] They are:

City of Willcox and Arizona Electric Power Cooperative, Inc.
Arizona Public Service Company
Nevada Power Company
Pacific Gas and Electric Company
San Diego Gas and Electric Company
Southern California Gas Company
Southern California Edison Company

[4] They are:

El Paso Natural Gas
Salt River Project Agricultural Improvement and Power District

[Continued]

are raised, some of which have merit. Eight questioned areas will be separately addressed. In our review the Federal Power Commission's authority is to be especially respected in matters of policy and logistics; consistency must be maintained in applying the Commission's policy judgments; complaints rooted in particular circumstances can best be treated on specific application for relief by the concerned parties to the Commission; and the settled law from this circuit and others which have addressed curtailment will, in the absence of importantly different circumstances, govern the resolution of complaints raised here.

I. Scope of Review

Initially, there is some dispute as to what provision of the Natural Gas Act provides the Federal Power Commission with the authority to review and promulgate curtailment plans. In Opinion No. 634, dealing with an interim curtailment plan, the Commission cited *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), which

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[3] [Continued]

Tucson Gas & Electric Co.
ASARCO
Compania Minera de Cananea, S.A. de C.V.
Inspiration Consolidated Copper Co.
Kennecott Copper Corp.
Pioneer Natural Gas Co.
Southern Union Gas Co.
National Rural Electric Cooperative Ass'n
Southwest Natural Gas Consumers
Nevada Power Co.
General Motors Co.
People of the State of California
Public Utilities Commission of the State of California

In addition, several of the petitioners also filed *amicus* briefs:

City of Willcox and Arizona Electric Power Cooperative, Inc.
Pacific Gas and Electric Company
Southern California Gas Company

upheld the Commission's authority to issue Order No. 431 requesting natural gas distributors to file curtailment plans. "While that affirmance was based primarily upon a tariff filing under Section 4 of the Natural Gas Act," the FPC stated in Opinion No. 634, "we are also operating pursuant to Sections 5 [5] and 16 [6] of the Act in this case." (Footnotes inserted.)

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[5] 15 U.S.C. § 717d(a) (1970) provides:

> (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(52 Stat. 823) (1938).

[6] 15 U.S.C. § 717o (1970) provides:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to

When Opinion No. 634 was before this court in *ASARCO*, we held that although section 16 of the Act empowered the Commission to alter and promulgate proposed curtailment plans, that section required reliance on section 5(a) of the Act as a "core section" to provide the substantive counterpart to section 16's procedural authority. The brief of El Paso as intervenor argues that the permanent curtailment plan, unlike the interim plan, was premised on section 4 of the Act as the "core section," but there is no basis for this in the Commission's Orders No. 697 or 697A. Nor could there be, since the Commission in these orders is imposing its changes on the curtailment plans, rather than merely suspending El Paso's proposed plan. For the purpose of imposing an alternate plan, section 5 is necessary. "Whenever the Commission . . . shall find that any . . . classification . . . or that any practice, or contract, affecting such . . . classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable . . . classification, . . . practice, or contract to be thereafter observed and enforced, and shall fix the same by order . . ." 15

> be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(52 Stat. 830) (1938).

U.S.C. § 717d(a) (1970). Sections 1(b) and 16 afforded ample authority to issue the general order requesting curtailment plans to be evaluated under section 4(b) (as the Supreme Court held in *Louisiana Power*) or to suspend a proposed rate change, but nowhere in section 4 is there granted the power to impose alternate rates.

The importance of the statutory section from which the Commission's action takes its legitimacy was pointed out by the Fifth Circuit in *Louisiana v. Federal Power Commission*, 503 F.2d 844 (5th Cir. 1974). In *Louisiana*, an interim curtailment plan had been issued, followed by a permanent plan with modifications. Since the interim plan had been promulgated after a section 4 hearing, the Commission was on record as having found it to be not unreasonable or discriminatory. "[W]hen FPC holds a hearing and orders a new curtailment plan, or revises an old one, it is exercising authority granted by section 5(a) of the Natural Gas Act. . . . Under that section, however, before FPC can issue a remedial order it must find that the existing curtailment plan is 'unjust, unreasonable, unduly discriminatory, or preferential.'" 503 F.2d at 861.

Similarly, in this case, the interim plan was promulgated as one meeting the standard of not "unjust, unreasonable, unduly discriminatory, or preferential." Accordingly, those aspects of Opinion No. 697's rate structure that amend the structure of Opinion No. 634 must be justified for reasons sufficient to uphold the *change* (and not merely the new structure) under a substantial evidence standard. Imposing this section 5 requirement, however, does not mean that the court cannot take cognizance of the fact that the Opinion No. 634 curtailment structure was imposed on an emergency basis, and without as full deliberation by the Commission as was possible for the permanent curtailment plan.

II. Definitions

The FPC has chosen to apply a set of definitions to its curtailment order. Several petitioners raise the general complaint that, since the definitions were promulgated in Order No. 493-A, a proceeding which was closed *after* the hearings on Order No. 697, to apply them to Order No. 697 is not valid under the Administrative Procedure Act.

In the first place, the definitions stated in Orders No. 493 and 493-A were reached after a full hearing, with notice to the parties, in compliance with section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1970). *See* "Utilization and Conservation of Natural Resources," 50 F.P.C. 831 & 1316 (1973). That these definitions would be used by the Commission in implementing end-use curtailment plans was obvious on the face of the order. And several parties to the present proceeding (including the City of Willcox, Arizona Electric Power, Southern California Edison, and General Motors) were among those whose objection to Order No. 493 led to the revised Order No. 493-A. 50 F.P.C. 1316, 1317.

A second response is that the parties who took part in the proceedings leading up to Order No. 697 were given full opportunity to comment upon the curtailment plan in all of the applications to which the Order No. 493-A definitions would refer, even if Order No. 493-A itself was not yet promulgated. The Commission was entirely within its authority to conclude that, based solely upon the evidence adduced in connection with Order No. 697, the definitions announced in Order No. 493-A were proper and useful to the implementation of Order No. 697.[7]

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[7] Various petitioners invoke our decision in Pacific Gas & Electric Co. v. FPC, 164 U.S.App.D.C. 371, 506 F.2d 33 (1974), which held the Commission's Order No. 467 to be

As a general matter, therefore, the Order No. 493-A definitions may be used in Order No. 697. There could be challenges to specific definitions, however, which would merit this court's intervention. Three definitions are singled out in the briefs: turbine fuel, fuel for irrigation, and fuel required for ignition and flame stabilization. Turbine fuel will be considered separately in part III, *infra*, p. 20.

Fuel For Irrigation Use

In Opinion No. 697-A, the Commission classified irrigation as a Category 3 end-use, along with other industrial uses for natural gas. The decision at that time anticipated the possibility of subsequent change, depending upon the unavailability of alternate fuel sources for irrigation. In Opinion No. 745, issued on November 13, 1975, almost a year after Opinion No. 697-A, that possibility had developed and the Commission, after hearings, reclassified irrigation use of natural gas on the El Paso system as an "industrial process use," to be placed in Category 2. That treatment was confined in an order denying rehearing, on July 2, 1976 (RP 72-6).

Hence, the origin[illegible] complaint lodged by several petitioners, before Opinion No. 745, that the curtailment plan improperly placed irrigation in a low priority, has lost almost all of its force. What remains is the charge, made most clearly by Southwest Natural Gas Consumers, Pioneer Natural Gas Company, and Southern Union Gas Company in their September 17, 1976, letter and subsequent submissions, that the more favorable treatment of gas intended for irrigation use was granted only as

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merely a non-binding statement of policy, not applicable without more to particular curtailment orders (and hence exempt from the requirements of the Administrative Procedure Act). For each of the two reasons just stated, however, that decision does not apply to the application of Order No. 493A.

a matter of extraordinary relief, affording them no assurance of the priority they desire. That position mistakes the nature of Opinion No. 745 on two counts.

First, petitioners suggest that the language "extraordinary relief" in the opinion denying rehearing belies the notion of permanent reclassification contained in Opinion No. 745. But that verbeage was only concerned with the procedural route leading to the order in RP72-6; it in no way makes the substantive result in Opinion No. 745 any less permanent. Opinion No. 745 was reached in a quasi-extraordinary relief proceeding which incorporated elements of a general reclassification procedure as well as a hearing on extraordinary relief. The decisions on several issues in that opinion emphasize its reasonably permanent nature. For example, on page 2 of the order denying rehearing, the Commission explicitly rejects a proposal that irrigation uses be reclassified into a lower priority as soon as alternative fuel sources became available. The reasons given by the Commission for not adopting a short-term Category 2 classification, and also for rejecting General Motors' proposal for irrigation classification according to the cost of conversion, were not expressions of short-term convenience, but grave doubts as to the Commission's own ability to administer such systems over the *long run*.

The second line of argument that Opinion No. 745 should not moot petitioners' claims regarding irrigation relies on the Commission's brief in Docket No. RP75-62, involving curtailment on the Cities Service Gas Company line. In that proceeding, the FPC presently indicates it will advocate an industrial classification for irrigation fuel. Passing over the problems of relying on an initial brief of an agency as a conclusive statement of agency policy, there is ample reason not to credit the FPC's position in *Cities Service* as relevant to El Paso. As the initial brief in *Cities Service* clearly explains, the in-

dustrial classification of irrigation fuel on that system was due to factors peculiar to that system, including the historical practices of Cities Service and the extent of likely curtailment. The Commission's order in El Paso will remain in effect unless and until need for further hearings arises, at which proceeding petitioners may be heard. That status is as permanent as any aspect of the curtailment plan, and petitioners' complaints regarding irrigation fuel must be dismissed as moot.

Ignition and Flame Stabilization

It is argued that petitioners' complaints concerning ignition and flame stabilization utilization of natural gas have over this same period become less ripe. In Opinion No. 634, the Commission defined Priority Category 2 as including "Large commercial requirements and industrial requirements for plant protection, feedstock and process needs." Pursuant to that definition, El Paso submitted a proposed tariff sheet defining the term "process gas" as "gas required as a fuel for which there is no feasible alternative. This term includes gas required for ignition. fuel and flame stabilization in the generation of electric energy." (J.A. 353, Tr. 13776). That definition was applied for purposes of the interim plan.

The Commission, meanwhile, was preparing its general definition orders, Order No. 493 and Order No. 493-A. Process gas was defined in the October 29, 1973, order as "gas use for which alternate fuels are not technically feasible such as in applications requiring precise temperature controls and precise flame characteristics." "Utilization and Conservation of Natural Resources," 50 F.P.C. 1316, 1320 (1973). At the time of promulgating Opinion No. 697, the Commission looked to this Order No. 493 definition and found that it adequately expressed the characteristics of those ignition and flame stabilization

uses intended for special priority under Opinion No. 634. Hence, it was no longer necessary for the definition of process gas to include explicitly ignition and flame stabilization.

When El Paso filed its tariff sheets on March 27, 1975, and April 11, 1975, in supposed compliance with Opinion Nos. 697 and 697A, the priority of ignition and flame stabilization fuel had been made explicit—but it was Priority Category 3 rather than 2. This decision was based upon El Paso's judgment of the ability of its users to substitute for natural gas in these functions. A storm of protest followed, much of which is reflected in petitioners' complaints to this court.

However, we do not presently reach whether El Paso's factual determination was adequate, or whether the Commission's explanation for the change in its language between the interim and permanent curtailment plans is satisfactory. On December 24, 1975, the Commission issued an order in Docket No. RP72-6 stating that "it is necessary to hold a limited hearing in this proceeding . . . to consider whether some or all alleged flame stabilization and ignition requirements are Priority 2 uses as the customers insist or are properly classified in El Paso's proposed tariff sheets." The Commission ordered that "a public hearing shall be held as soon as practical" on this matter. (RP 72-6 at 15).

The possible availability of findings of fact relevant to the ignition-flame stabilization-process gas question argues for waiting. There has been no indication to this court of action on the proposed hearing since it was announced in December of 1975, however; and it is open to any of the petitioners here to seek again our immediate review should the hearing have been unwarrantedly postponed.

The present status of the curtailment order requires some intermediate relief, however. Opinion No. 634 pro-

vided Priority 2 classification for ignition and flame stabilization use of natural gas. The explicit reason offered by the Commission in Opinion No. 697 for removing the reference to ignition and flame stabilization was only that it was superfluous; not that those uses were actually more able to substitute alternate fuel than had originally been thought. Hence, El Paso's lowering of the priority for *all* natural gas devoted to these uses can only be seen as a substantial change in what was intended by the interim and permanent curtailment orders. The hearing proposed by the Commission will determine whether there is adequate evidence justifying this change; but in the meantime, the only curtailment priority approved by the FPC and sustainable by substantial evidence was the one established by the interim order, which, according to the FPC, was intended to be carried over into the permanent plan. Until the Commission determines, after a hearing, that there is substantial evidence proving that all flame stabilization and ignition uses for natural gas can, with "technical feasibility," be replaced by alternate fuels (as all those terms have been defined by the Commission), Priority 2 classification must be accorded to flame stabilization and ignition.

III. Boilers

In *ASARCO*, *supra*, we reversed the subordination of boiler fuel uses to other end-uses provided in the interim plan because of the FPC's failure to articulate the reasons for such treatment. In Opinion No. 697, the Commission attempts to remedy this omission by listing three reasons supporting the lower priority for boiler fuel use: (1) alternate fuels could be more easily substituted for natural gas in boiler fuel applications than in other applications; (2) the "increase in air pollution resulting from the use of alternate fuels could be more efficiently and economically controlled" on boiler installations because of their larger size; and (3) economic disruption would be minimized by curtailing single large users such as boilers. (J.A. 431, Tr. 16,604-05). The second and third of these are persuasive.

Because the FPC is sustained on other grounds, the inadequacy of its first explanation will be considered only in footnote.*

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* In its brief, the Commission points to three instances in the record to defend its first reason. None of these sustain the proposition that, as opposed to other industrial uses, boilers were more able to use alternative fuels. The evidence all related to different issues.

The first reference is to testimony by the witness Truax that it would take time before substitutes could be developed for industrial uses requiring natural gas as a *process* fuel. At it strongest, the testimony would only support a conclusion that boilers, as one example of non-process fuel users of natural gas, *could* more easily find substitutes for natural gas than could users of natural gas as a process fuel. (J.A. 67, Tr. 1837). This says nothing about boilers within the class of non-process (industrial) fuel users.

The second record citation is to testimony by the witness Helmut Frank. On the general issue of alternatives to natural gas, the witness testified that "residual fuel oil is not a practicable alternative for current gas users," except for under-boiler use, as in steam-generated electric plants." (J.A. 91, Tr. 4363). Once again, that single statement cannot support the inference that *all* boiler fuel usage is more able to shift to residual fuel than all other industrial uses for natural gas.

The last record evidence relied upon returns to the process-industrial fuel distinction. The witness Markus commented on the alternative fuel availability for process use of natural gas, and concluded that the capital costs of re-tooling those plants using natural gas as a process fuel to permit them to accept other fuels would be quite high. (J.A. 97-99, Tr. 7048-7050).

Entirely lacking in all of the record evidence cited is a simple statement by a single expert that alternative types of fuel could more easily substitute for boiler fuel usage of

In the Commission's second explanation, the larger size of boiler installations, as compared with other natural gas users, is suggested as a reason for the more economical control of air pollution, which would result from the use of alternate fuels, by boilers rather than by other operations. There is sufficient record evidence for this conclusion. Among other testimony the Commission refers to the witness Markus on this point. (J.A. 99-102, Tr. 7050-7053). He draws a distinction between boilers at electric

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natural gas than for any other industrial use of natural gas. Had Order No. 697 subordinated all industrial use to all process use, that would have been upheld by the record citations; but the disadvantageous treatment of boiler fuel vis-a-vis other industrial uses has not been sustained.

When Opinion Nos. 643 and 643A, involving curtailment on the Arkansas Louisiana Gas Company system, were considered by this court, and when Opinion Nos. 647 and 647A, involving curtailment by United Gas Pipe Line Company, were ruled on by the Fifth Circuit, Louisiana v. Federal Power Commission, 503 F.2d 844 (5th Cir. 1974), the subordination of natural gas in boiler fuel uses was sustained. Arkansas Power & Light Co. v. FPC, 170 U.S.App.D.C. 393, 398, 517 F.2d 1223, 1228 (1975), *cert denied*, 424 U.S. 933 (1976); *Louisiana*, *supra*, 503 F.2d at 860. It would be tempting to accept this preference as a settled matter on the basis of these other decisions. However, the nature of the issue prevents this. As the Federal Power Commission itself has realized, "there is no superior or inferior use of natural gas *per se;* it depends upon the circumstances." Chandeleur Pipe Line Co., 45 F.P.C. 370, 371 (1971). The fact has been amply justified by the several pieces of record evidence that have been brought to light: fuel use is quite different in electricity generation, in turbines, in under-boiler applications, and in other boiler usages. The purpose of our reversing and remanding the boiler fuel provision in *ASARCO* was to obtain the type of information, particular to the usages on the El Paso system, that would sustain the logic of a "boiler-fuel vs. all-other-use" distinction. The evidence to which the Commission now points is of no more avail in this regard than the invocation of "established Commission policy" that was found insufficient in *ASARCO*. 161 U.S.App.D.C. at 26, 494 F.2d at 945.

generating stations and boilers at industrial plants, with the former being both more efficient and more able to substitute alternative fuels. The basic difference is size; electric generating boilers are of a larger magnitude, and the witness notes that a "large pollution control installation can control pollution at a lower cost per unit of fuel consumed than can a small installation." Most important, the witness gave testimony that the benefits to both kinds of boiler uses "reflect efficiencies of scale not feasible for the operator of a typical industrial boiler." (J.A. 100, Tr. 7062). This testimony provides the Commission with an adequate defense for its pollution control argument.

In this connection, we recognize that the Arkansas-Louisiana and United Gas curtailment plans' boiler subordination mentioned above (*see* footnote 8) were not sustained on the pollution-control argument. The fault in each instance, however, was not a failure of logic, but an absence of record support. At least for the El Paso system, that fault has now been corrected.

The last justification offered is closely patterned to the previous one. Since boilers are the largest users of natural gas, on a per plant basis, more natural gas can be curtailed with fewer plants affected if boilers are the first curtailed. The record portions cited by the FPC's brief are inapposite, but there is sufficient evidence already alluded to in the discussion of the second rationale to uphold this explanation. We note that the phrasing of this advantage has changed from that suggested by the Commission in the Arkansas-Louisiana and United Gas curtailment plans, *supra*. In those cases, the premise was that boilers could more easily substitute alternate sources of fuel, and for that reason the economic disruption from curtailment would be minimized by cutting back boilers first. The Commission no longer relies on that premise for the justification based on minimization of economic dislocation.

Opinion No. 697's inclusion of natural gas used by electricity-generating turbines within the boiler fuel category raises a separate problem. The interim curtailment order, Opinion No. 634, excluded "gas-powered turbines utilized for electric generation" from the definition of boiler fuel use (J.A. 341, Tr. 13,748), but this decision was reversed in Opinion No. 697. The stated reason for this change was that "[a]s a practical matter, we cannot control the use of natural gas in electric generating boilers without including volumes available for use in gas turbines within the definition of boiler fuel use." (J.A. 506, Tr. 17,102). Turbine use has been found to be less efficient than boiler utilization for the generation of electricity. That finding is sustained on record evidence. *See, e.g.*, J.A. 100, Tr. 7051. But the Commission went on from that fact to infer that natural gas allocated to turbine use would be diverted to electricity generation through boilers whenever possible. That step of inference is totally without support in any piece of evidence of actual diversion. On this record, it is entirely surmise. No doubt the Commission is entitled to a great deal of latitude in predicting how its orders will be applied by the industry. The Commission places its entire argument concerning this question on that proposition.[9] But Opinion No. 697 is not a new order, written as the Commission's first venture into curtailment. It follows upon an interim order, and changes in that interim order must be justified. (*See* Part I, *supra*). In the absence of the slightest

[9] The dissent would uphold the lower classification of natural gas devoted to turbines on the basis that such a use is less efficient than boiler use. That factor alone would not justify lower priority since turbines might also use alternate fuels less efficiently, or with more detrimental impact on the environment, than boilers. However that question may be resolved, the only basis upon which the Commission's order relied was the possibility of substitution (J.A. 506; Tr. 17,102), and that basis cannot be sustained.

reference of abuse during the period of the interim order, there is nothing to sustain the Commission's change of mind on turbine fuel usage. Even if the provisions of section 4(b) of the Natural Gas Act, rather than the specific-finding of discrimination provision of section 5 (a), were held to govern the promulgation of Opinion No. 697, there is lacking here any evidence of "undue preference or discrimination."

The Commission also counters with the argument that, since the turbine-fuel objection is principally raised by Arizona Electric Power Company (AEPCO), it could seek a special reclassification. (Brief for Respondent at 58). That is an attractive suggestion, but courts must be careful not to close out legitimate claims on the hopes that they will be otherwise redressed. Perhaps Arizona Electric could obtain a reclassification, but to proceed by individual variance is to admit that the overall concept is valid. Arizona Electric does not allege particular facts whereby its situation should be distinguished from such a generally valid order, it attacks the fundamental basis for the order. Before commending Arizona Electric to the particular relief suggested by the Federal Power Commission, we would have to be convinced that the general plan was, indeed, sustainable. And that case has not been supported by substantial evidence.

IV. The Base Period

The curtailment plan envisions a maximum limit on the amount of natural gas going to each of El Paso's customers. These "base volumes" become applicable whenever El Paso's supply of natural gas falls short of the current demand. They prescribe the total amounts of natural gas by priority classification available for the various users.

Three problems have arisen from the time periods in the past which were used in establishing the base volumes. Opinion No. 634, issued on October 31, 1972, established

the twelve month period immediately preceding that date as the appropriate measuring time. The first objection raised to that procedure was that, by measuring actual historical use of El Paso gas over that twelve month period, the plan paid no attention to the then-developing shortage of non-El Paso natural gas. That shortage was allegedly critical to the California customers who, as explained before, did not rely exclusively on El Paso. The two California users maintained that setting the El Paso gas supplied during the last twelve months as the maximum volumetric entitlement in time of curtailment unfairly assumed that all users were otherwise identically situated. Because of the developing scarcity of non-El Paso natural gas, it was likely that the California users would have to increase their reliance on El Paso natural gas in the near future; but that contingency had not been envisioned in the El Paso curtailment plan.

When this complaint was before this court in the context of the interim plan, we decided that, because of the emergency, short-term nature of Opinion Nos. 634 and 634-A, it was not fatal to ignore the developing "pre-existing curtailment" of non-El Paso sources felt by the California customers. *ASARCO* at 942. Our decision there was explicitly premised on an expectation that the Commission would consider the local California natural gas shortage in promulgating a final, permanent plan, and would "enunciate findings with respect to that situation" as well. Now that the permanent plan has come before us, we again consider whether the Commission's decision to ignore the pre-existing shortage of local gas in California was unduly discriminatory to the California users.

Two related issues have also become involved in our review of the time period established for calculating base volumes. First, no explicit prohibition against adding new users to the various distributors' systems with-

in the general El Paso system was contained in the interim curtailment order. Several of the EOC distributors, subsequent to the date of Opinion No. 634, did add new customers, including customers in the top priority levels.[10] Opinion No. 697A took account of this by establishing a moratorium on adding new customers, for purposes of receiving curtailment allotments of natural gas. As for those new users added during the twenty-five and one half month interval between the interim and final plan, Opinion No. 697A provided that the base period for volumetric calculation would be "actual historical takes for the 12 month period ending October 31, 1972, adjusted to also reflect the annualized effect of attached Priority 1 and 2 loads existing as of October 31, 1974." (J.A. 489, Tr. 17,085). In addition, penalties were imposed for all natural gas withdrawn in excess of the volumetric limits, except where necessary to protect a Priority I or II use. The date of Opinion No. 697A was December 19, 1974.

Tucson Gas & Electric and Arizona Public Service Company ("APS") raise the objection that the gap between October 31, 1974, and December 19, 1974, places them in a predicament. These companies during this period were adding high priority users in reliance on the interim order's absence of any limitation on attachments, only to be told later that those users could not be included in the curtailment allocation. The argument is carried even further that, since these utility companies are required under state law to receive permission before they can refuse a requested extension of service to a user in what has come to be a high priority classification, it was unreasonable to impose a moratorium on attachments even as of the date of the issuance of

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[10] Tucson Gas & Electric Company added 3,000 residential and commercial users during the October 31-December 19, 1974 period. (Brief of Tucson as Intervenor at 18). (The term "EOC" means "East of California.")

Order No. 697A. Instead, it is contended, the curtailment plan should have taken cognizance of all new attachments until such time as Tucson and APS could receive authority from the State of Arizona to refuse such new requests for service.

The last problem arising out of the base period determination stems from the meteorology of the period: the winter of 1973 and pre-November 1974 were unusually warm. Hence, the Arizona users allege, their reliance on El Paso natural gas was abnormally low and a more expectible average of natural-gas use should have been employed.

The second of these three problems is most usefully discussed first. It is arguable how justified was the reliance of those natural gas distributors who added customers subsequent to the interim curtailment order. There was never any doubt that the conditions of the eventual curtailment plan would require some calculation of a maximum amount of natural gas, and that for each distributor, such a calculation would necessitate a ceiling on the number of customers to be served. On a fuller record, it might be concluded that those exceptions should be afforded only to those distributors who, having sought refusal powers from their state regulatory bodies immediately upon the issuance of the interim plan, were nevertheless denied. However that may be, the Commission has stated quite a different position, which bears upon all three problems here addressed. In Opinion No. 697A, the FPC stated, "we recognize . . . that growth in the higher priorities would in fact have occurred in the normal course of load upgrading, since no express prohibition was contained in the interim plan and in view of our decision not to impose overrun penalties for the interim plan. . . . [W]e find that the only reasonable alternative is to require El Paso to adjust the Opinion No. 697 base period to reflect that growth." (J.A. 488, Tr. 17084).

The Commission's own judgment is that it is entirely appropriate for the natural gas distributors to have added customers up until the time they were explicitly told not to do so. The logic of that position extending their entitlement must be consistently applied. Accordingly, it was arbitrary for the Commission to refuse to order the inclusion of those users added up until the date that Opinion No. 697A was actually promulgated, and the explicit prohibition on attachment of further high priority users was declared. However, because the December 19, 1974, order by the Federal Power Commission was preemptive it was reasonable to exclude from the base used for the curtailment plans those users added after that date, even if that was before the time distributors obtained state permission to exclude them. The FPC argues that APS and Tucson were dilatory in requesting authority to refuse new, high priority users on their respective systems. If that were so, that would be an additional ground for excluding post-December 19, 1974, customers. Both APS and Tucson delayed until late February. Whether the additional two-month interval was excusable and reasonable or whether APS and Tucson should be held to be bound from the date they received notice of the Commission order providing for the exclusion from the base period of new customers added thereafter we leave to be settled at a hearing before the Commission on remand. Nothing prevents the FPC as a matter of discretion from granting special relief to suppliers in this predicament, but that is not required.

The Commission's decision in Opinion No. 697A to depart from the six-month time period ending on October 31, 1972, was motivated by a desire to accommodate certain EOC customers of El Paso, who otherwise would have had more actual demand on their system for natural gas than had been recognized in the curtailment plan. That disposition must be applied equally to the Cali-

fornia customers as well. Their position also involves more demand on their system for natural gas (because of a scarcity of non-El Paso gas) than had been recognized in the curtailment plan. To alter the curtailment plan for EOC customers might not have been necessary; but, having done so, the FPC assumed an equivalent obligation for the California customers as well.

The Commission relies on four pages of Opinion No. 697, and two attached exhibits, to satisfy our mandate in *ASARCO* to "consider the pre-existing shortages in California and to enunciate findings with respect to that situation." *ASARCO, supra*, 161 U.S.App.D.C. at 23, 494 F.2d at 942. The evidence recited in those pages of the opinion (J.A. 434-39, Tr. 16608-16611) refer to the non-El Paso sources of natural gas for the California customers. The Commission admitted that "deliveries to interruptible customers [by non-El Paso sources] have been declining since 1970," and concluded that "this decline in service can be attributed to two factors only. One, that the California source supplies are declining, which is a fact of record, and (2) that the gross industrial market for natural gas in Southern California has been growing, which is also a fact of record. (Ex. 105). Solutions to both of these causal factors are clearly outside the scope of the Commission's jurisdiction." (J.A. 436; Tr. 16609-16610).

These references do establish that the Commission paid attention to the shortage of natural gas in California, but they fall far short of providing a basis for justifying the FPC's failure to provide some relief to the California users because of that shortage. To say that scarcity is due to high demand and low supply is simply to state a tautology of economics. It is well within "the scope of the Commission's jurisdiction" to consider the need for natural gas in the area even though the need has become more critical because of a developing scarcity of local

gas, and to increase the supply by a more lenient curtailment plan that did not treat as equivalents two sets of customers in vastly different situations regarding their supply of natural gas. It was precisely the factor of growing demand (between the time of the interim and final curtailment orders) that the Commission found to be fully expectible and deserving of consideration for the Arizona customers. California customers are entitled to have their needs similarly considered.

The Commission parries by stating that, even if true that the California users will have more occasion to rely on El Paso, as their alternate fuel sources dry up:

> One significant and highly variable factor controls the ability of industrial consumers exposed to natural gas curtailment to continue their operations, to wit, their ability to use and secure alternate fuels. There is no evidence in this record that industrial consumers in California are in a worse position with respect to their ability to use or to secure alternate fuels than consumers located in E-O-C. (J.A. 437, Tr. 16610)

The simple refutation is that California consumers will be forced more often to resort to alternate fuels because of their heightened scarcity of natural gas. That disparate scarcity, if such be the fact, between California and EOC users, raises a *prima facie* inference that FPC treatment of both classes of consumers identically, in terms of historical reliance on El Paso, is discriminatory in the most important sense of the Act, the need for natural gas. The Commission would have to establish that California consumers were singularly *more* able to employ alternate fuels than EOC consumers before it could rebut that *prima facie* case. The Commission has not done so.

The Commisison is required to give more consideration to the peculiar shortages in California in order to comply with our *ASARCO* opinion, and, also, as a matter

of affording equal treatment to California and EOC customers. This does not mean that El Paso must supply the *full* amount of the shortfall experienced in California because of local conditions. Other factors such as the difference in priorities of use, and a proven greater ability to use alternate fuels, might, in the end, support a decision requiring less than full contribution. But the precise result cannot be foreseen, cannot be dispensed with by the conclusory statement offered by the Commission on this record, and must be made the subject of explicit findings following a full hearing."

The final objection raised concerning the base volumetric curtailment period does not necessitate intervention by this Court, but may be amended by the Commission in its reconsideration of the matters that are to be remanded. It was not mandatory for the Commission to consider whether the periods of measurement used in establishing the base volumes covered an unusually warm period in Arizona. If the Arizona distributors claim they have a right to additional volumetric entitlement because the base period covered an unusually warm winter they

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" The dissent reads too severely what is required by our remand of this point. We do not hold that the Commission policy of equal curtailment of full and partial requirements customers, or pipeline-by-pipeline regulation, be "subverted" in any way. The problem we see, rather, is with the base period, during which the California customers' reliance on El Paso was alleged to be less than it has now become. The Commission's own order recognizes that alternate supplies to California users have dropped since "the time the record was compiled in this proceeding" (J.A. 436, fn. 8; Tr. 16,609, fn. 8). Whatever policy the Commission wishes to follow, it must be based on an appreciation of present needs of the several areas relying on the El Paso system, rather than on historical records of use measured in September of 1972 (J.A. 417; Tr. 16,592); particularly given the Commission's recognition (*supra*) that California customers' reliance on El Paso was at that time in a state of flux relative to EOC users.

are free to petition the FPC for a variance, but they will be required to show that the weather in their area operated to *discriminate* against them relative to consumers in other areas on the pipeline. If the effect of the weather during the base period was reasonably uniform throughout the entire system all distributors would be affected in the same way and none would be entitled to special consideration.

In sum, a remand to the FPC is necessary regarding the base used for volumetric entitlements and the claims of the Arizona distributors. Volumetric entitlements to El Paso customers must reflect consideration of *total* natural gas needs and the possibility of satisfying said needs, at least to some extent, from El Paso gas, rather than rigidly reapportioning entitlements solely on the basis of historical use of El Paso gas. This is what is required by the Natural Gas Act's prohibition against discrimination, 15 U.S.C. §§ 717c, d (1970). It may be that the Commission in its judgment will decide that the increasing California shortages cannot, in fairness to other users of higher priority on the system, be met by additional entitlements of El Paso gas, or can only partially be met from that source, but this does not mean that the Commission can avoid its statutory obligation by a conclusory finding that it lacked jurisdiction. It has jurisdiction, even though the volume of available El Paso gas, the higher priorities of other distributors, and the ability to use alternate fuels may seriously restrict the ability or need for the Commission to exercise its jurisdiction to increase California entitlements.

The Commission must also turn its attention on remand to the post-Opinion No. 634 additional users on the Arizona systems. Unless the FPC holds new hearings and sustains a change in its position on including those users in the volumetric entitlement calculations, it must extend consideration to all new users added up to the time of Opinion No. 697A's promulgation, December 19, 1974, not just to October 31, 1974.

No change is presently mandated concerning weather conditions over the base period.

V. Fuel Storage

The injection of natural gas into storage tanks by PG&E and SoCal, the two California customers of El Paso, creates a difficulty in the curtailment categories that was first addressed in our *ASARCO* opinion. The interim plan on review there, Opinion No. 634, treated natural gas retained in storage as outside the scheme of any end-use deserving priority classification. Conversely, when such natural gas was withdrawn from storage, it was treated as though it had been supplied from an independent source.

The interim plan had allocated natural gas between the California and EOC users in accordance with the percentage reliance of each user upon the El Paso system. All the EOC users relied exclusively on El Paso, but the California users had alternate sources for natural gas, with the result that they received about 80% of their total supplies from El Paso. The central concept of the curtailment plan is to accord as much natural gas as possible within each priority category, up to a user's total needs, and then to progress to the next highest priority level. But in determining what a user's total needs were, the California customers were evaluated at their needs *from El Paso*, or about 80% of their actual total needs.

With a fixed amount of natural gas supplied by El Paso, the California users made up the difference at peak times from other sources, and at slack times, injected the El Paso-supplied surplus into storage tanks. The EOC customers, in contrast, stored no El Paso fuel but altered their daily purchases depending upon conditions.

By treating the natural gas taken from the California users' storage tanks as coming from an independent supply, Opinion No. 634 reduced the estimate of those users' reliance on El Paso. It seemed as though more natural gas was coming from non-El Paso sources than was actually the case. Accordingly, the allocations to the California customers of curtailed gas were lower than they should have been. It was this unfairness that prompted the remand of the issue in *ASARCO*.

The response of Opinion No. 697 was to treat storage-injection as an end use in itself, and afford it Priority 2 classification. The Commission's reasoning was "Natural gas used for injection into storage should also be accorded a relatively high priority as the primary purpose of storage is the protection of service to residential and other temperature-sensitive consumers during the winter heating season." (Tr. at 16,602; J.A. at 428). That statement incorporates two separately distinguishable conclusions concerning origin, and then priority, of storage gas.

Since Opinion No. 697, like Opinion No. 634, views withdrawals from storage as an independent source of fuel supply, our mandate in *ASARCO* is sought to be complied with by recognizing the El Paso-origin of storage fuel as it enters storage, rather than when it is taken out from storage. That is an acceptable way of guaranteeing that the California users are not viewed as less dependent upon El Paso natural gas than they actually are. The second step is to decide in which of the five priorities the natural gas allocated to storage should be placed. If the storage gas were measured as it was used, this would present no problem, for then it would simply be added to the other volumes of gas being utilized for each of the priority classifications. But the Commission's decision to consider storage fuel as it enters storage presents it with a difficulty from which it is not fully extricated by Opinion No. 697A.

In Opinion No. 697, all storage gas was accorded Priority 2 classification. This solved the problem of underestimating California users' reliance on El Paso. However, it accorded a high priority to substantial quantities of natural gas that might not eventually be consumed in a high priority end-use. The FPC's language in Opinion No. 697, quoted above, was weak on its face: because the *primary* purpose of storage gas was Priority 1 or 2 uses, the *exclusive* priority classification for such gas would be Priority 2.

The Commission's proposed correction, in Opinion No. 697A, was to afford Priority 2 classification only to that percentage of a customer's storage gas equal to the percentage of natural gas actually devoted to a non-storage Priority 1 or 2 end-use by the particular customer. This meant that all other storage gas was treated as not coming from the El Paso system, either at the time of injection or at the time of eventual utilization. To that extent, the Commission has failed to comply with our *ASARCO* decision, where, with reference to a proposal by the FPC staff rejected by the Commission, it was stated:

> There is no suggestion that the proposed storage adjustment formula would impede implementation of the interim plan. The mere fact that the solution is complicated cannot justify the Commission in refusing to provide just and reasonable interim curtailment procedures. We therefore remand this matter to the Commission for further consideration of the proposed storage adjustment formula.

ASARCO, *supra*, 161 U.S.App.D.C. at 24, 494 F.2d at 943."

" Opinion No. 697A did correct one weakness in Opinion No. 697. Opinion No. 697 had recognized only *net* storage fuel injections over the course of the year as being supplied by El Paso. (Net storage fuel injection represented the excess fuel injection into storage over fuel withdrawn from storage for consumption). Opinion No. 697A realized that, over a year, that measure would not be reflective of the *gross* volume of El Paso gas that was injected into storage. Opinion No. 697A adopted a scheme that would approximately measure the gross amount of El Paso gas being put into storage. A direct measure of that amount was not attempted. Instead, the Commission took account of the fact that most storage gas is injected in the summer, and withdrawn for use in the winter (although some withdrawals do occur in the summer, and there are sometimes injections in the winter). Hence, injections minus withdrawals in the summer months (*i.e.*, *net* summer injections) are a rough approximation of gross total injections over the year (J.A. 496-97; Tr. 17092-93). While a more precise estimate would be desirable, the FPC's choice of method in Opinion No. 697A is not so arbitrary as to compel reversal—particularly because an issue purely of measurement technique is involved.

Hence, the Commission failed to accomplish what it set out to do in Opinion No. 697A regarding the storage fuel priority classification. Rather than relying on its former assumption that storage fuel was primarily intended for residential and other high priority uses, the Commission offered the solution described above. But the premise of that solution, that natural gas taken from storage will be distributed across all end uses and priority classifications, is not correct. Storage gas is relied upon primarily for low-priority end-uses. When the need for storage use arises, it must be that the other sources of natural gas have not been able to supply all current demand. But the higher priority uses would have been met first. Hence, the function of storage gas must be to supply the lower tier of priorities in the order of their preference. Admittedly, there could be occasions where the shortage was so severe, that in order to supply even the top priority category, resort to storage would be necessary. But as a general rule, at least for the immediate present, the percentage of *storage gas* that is

used for higher priority end-uses will be less than the percentage of *all gas* that is used for higher priority end-uses.

A remand to the Commission on the issue of storage is therefore necessary. In revising its permanent curtailment plan for the El Paso system, the Commission must guarantee: 1) That all use of El Paso-originating natural gas (whether detained in storage for a period of time or not) be recognized in setting the percentage reliance of California customers upon El Paso. 2) That double counting be avoided either by considering the El Paso origin of the natural gas as it is injected into storage, or as it is withdrawn from storage, but not both. 3) That the priority accorded to natural gas kept in storage be in proportion to the eventual end uses of that gas, unless the Commission wishes to support with an evidentiary hearing the importance of storage gas irrespective of the end use to which it is eventually put. This last position was strongly hinted at in the Commission's brief, but formed no part of the storage-priority decision by the Commission itself, and hence cannot be accepted as an explanation before this court. *Securities and Exchange Commission v. Chenery Corporation*, 318 U.S. 80 (1943).

VI. Environmental Impact Statement

A problem is raised by the intervenor Salt River Project Agricultural Improvement and Power District concerning the compliance of Order No. 697 with the National Environmental Policy Act of 1969. Under that Act, all federal agencies are required, "to the fullest extent possible," to

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action . . . .

42 U.S.C. § 4332 (1970). The proposed permanent curtailment plan has been issued without any environmental impact statement. Although the Commission at one time maintained that curtailment plans were, because of their contingent nature, exempt from the requirement of filing an environmental impact statement, it now recognizes that the court's *ASARCO* opinion, and that of the Fifth Circuit in *Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974), have ruled unacceptable that manner of procedure. Accordingly, in Opinion No. 697A, the Commission reluctantly concludes:

> We are therefore constrained to remand this proceeding for the limited purpose of preparation and circulation of an environmental impact statement in accordance with Section 102(2)(c) of NEPA. This step is taken in spite of our belief that the impact statement so developed will add little of substance to the environmental record already developed in this proceeding.

This left the question of what force the Commission wished to attach to Opinion No. 697 before the environmental impact statement issues. Finding that immediate implementation of the plan was necessary, the Commission decided that Order No. 697 (and 697A) "should therefore be considered as a revised interim plan until such time as the Commission rules on its appropriateness as a permanent plan for the El Paso system." (J.A. 509-510; Tr. 17105-17106). The Administrative Law Judge to whom the opinion was remanded was given authority "to modify the plan as may be required by the environmental evidence" adduced at this hearing (*Id.*)

The fact that this plan is officially an interim one does not oust the jurisdiction of this court. *See ASARCO, supra; Louisiana, supra.* They are nonetheless final FPC actions. And if the changes made on the basis of the environmental hearings are as minor as the FPC ex-

pects, any review of the permanent curtailment plan can be considerably abbreviated by reason of the opinion in this case (except, of course, for challenges to the adequacy of the environmental impact statement).

It is Salt River's contention, however, that the issuance of Opinion No. 697 should be held up, even as an interim plan, until the environmental impact statement is provided. The effect would be the continued applicability of the original interim plan, a matter of no small monetary consequence even if the environmental statement were furnished within a few months. A related question is whether it is consistent with NEPA to treat an environmental impact statement in the begrudging manner that admittedly characterizes the FPC's action in this case. More specifically, is there an obligation to consider environmental consequences as a major federal action is being planned, or is it sufficient to proceed with the development of the program, announce it, and only then turn to a consideration of the environmental consequences?

The second question can be disposed of as not yet ripe for adjudication. The adequacy of the environmental impact statement can only be judged once that document has actually been produced. The Commission's remand to the administrative law judge affords him a wide baliwick for his authority to consider environmental effects, and this court cannot say that no amount of post-hoc consideration, study, and alteration of the curtailment plan could ever satisfy NEPA's requirements. However, it is well to repeat the warning this court issued in *ASARCO*, that "our ruling today is not a license for permanent or prolonged evasion of responsibilities under NEPA." *ASARCO, supra*, 161 U.S.App.D.C. at 30, n.47, 494 F.2d at 949, n.47. In *Scientists' Institute for Public Information, Inc. v. AEC*, 156 U.S.App.D.C. 395, 408, 481 F.2d 1079, 1092 (1975), we stressed that the purpose of an environmental impact statement is to pro-

vide information "*before* the action is taken" so that alternatives can be considered (emphasis added). *Cf. Kleppe v. Sierra Club*, 427 U.S. 390 (1976). Similarly, in *Louisiana*, the Fifth Circuit, while recognizing that speculation was unavoidable, interpreted NEPA as requiring that the "FPC, *in formulating that plan*, take into consideration as best it can the plan's probable effect on the environment." *Louisiana* at 876 (emphasis added). Those two curtailment plan decisions recognized that the environmental impact statement, to be useful in the way intended by the statute, must be issued as part of the formulative process of the plan, rather than serve merely as a post-hoc catalogue of the environmental results of a complex plan developed without reference to those impacts. Reliance on an interim curtailment plan, and particularly one which the FPC states will in all likelihood become the permanent plan, could well develop. Once it does, the tardy issuance of an environmental impact statement would unduly influence the balance of considerations against change, even when necessary to avoid serious environmental consequences. *Calvert Cliffs' Coordinating Committee Inc. v. United States Atomic Energy Commission*, 146 U.S.App.D.C. 33, 449 F.2d 1109 (1971). To all this we add a qualifying note. Any reasonable person will recognize that a meaningful and final EIS cannot be prepared on *all* aspects of any plan until the full details of that plan are known. However, the mandate of the statute requires environmental consequences to be considered throughout the formulation of the plans to the fullest extent possible. Some situations call for an interim EIS. The requirements of NEPA to any situation can be resolved by a common sense application of these principles."

" 42 U.S.C. § 4332 (Supp. V, 1975) provides:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and ad-

Hence, while we refrain from staying the applicability of the interim plan until the environmental impact statement has issued, we do caution that this forbearance is

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ministered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with

premised on the expectation that the Commission will develop a complete environmental record, considering all relevant alternatives as fully as though no interim cur-

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respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire state-

tailment plan had intervened. Expectancy interests can be kept at a minimum by the understanding that since the Administrative Law Judge under the statute will have this broad authority to revise the plan, reliance on the interim plan will not necessarily control his decision.

The issue still remains, however, of whether it was permissible to by-pass an environmental impact statement even construing Order No. 697 as an interim plan. The language of the National Environmental Policy Act in its terms would require such a statement even for an interim curtailment order. But the Natural Gas Act requires the Commission "to take effective interim curtailment action in the exigencies presented by gas

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ment or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(89 Stat. 424)

shortages," *Atlantic Gas Light Company v. FPC*, 476 F.2d 142, 150 (5th Cir. 1973), and this obligation has been held, in other circumstances, to override the NEPA filing requirement.

Calvert Cliffs' announced that only such a "statutory conflict" could constitute an impossiblility sufficient to overcome NEPA's requirement of compliance "to the fullest extent possible." [11] In *ASARCO*, the impending 1972-1973 heating season created the need for an immediate curtailment plan, without the delay involved in the preparation of an environmental impact statement. *ASARCO*, *supra*, at 948. In *Atlantic Gas*, *supra*, the court was less specific as to immediacy, finding that "A detailed evaluation of the environmental impact of a curtailment order would entail precisely the sort of delay which the Supreme Court noted and disapproved in the course of a decision which held that the Natural Gas Act authorizes the Commission to follow summary procedures in exercising its curtailment power. Louisiana Power & Light Co. v. Federal Power Commission." 476 F.2d at 150. Salt River asserts that no case for immediate need has been made out in the present setting. The Commission responds that there is ample evidence sustaining the changes made in Order No. 697, and that it would be contrary to its obligation to the public to postpone implementing a preferable curtailment plan. No attempt to argue exigent circumstances is made by the Commission. If we were to accept the Fifth Circuit's view, of course, exigent circumstances would not be required to uphold the FPC's right to implement its new curtailment order.

The choice is between (1) ordering the reinstatement of the previous interim curtailment plan under Order No. 634, while remanding Order No. 697 in its entirety

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[11] *See also* Concerned About Trident v. Rumsfeld, —— U.S.App.D.C. ——, ——; —— F.2d ——, ——; No. 75-1515 (D.C. Cir. Oct. 13, 1976) at 10.

for reconsideration of environmental factors and the ultimate issuance of a permanent curtailment plan and environmental impact statement; and (2) approving the continued applicability of Order No. 697 (subject to the specific objections sustained elsewhere in this opinion) with the understanding that the Administrative Law Judge will have broad revision power to incorporate changes called for by environmental considerations.

As a matter of common sense, the latter is the less disruptive course. It should also vindicate NEPA's concern that major federal agency action be undertaken only when fully informed of environmental consequences. The Supreme Court, in an opinion subsequent to *ASARCO* and *Atlantic Gas*, has shed light on the practical approach that should be taken regarding the filing of environmental impact statements. In *Aberdeen & Rockfish Railroad Company v. SCRAP*, 422 U.S. 289 (1975), the Court was presented with a request for an environmental impact statement in connection with proposed surcharges and general rate increases approved by the ICC. The Court held that a statement was not required until ICC approval of the railroads' proposals had actually been issued. "[T]he time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action." *Id.* at 320. *Cf. Kleppe v. Sierra Club*, 427 U.S. 390, 402 (1976).

Still, it might be contended (and Salt River does so argue) that Opinion No. 697 was exactly what the Supreme Court had in mind as the type of agency recommendation on proposed federal action that would require an environmental impact statement. It is all the more instructive, therefore, to observe that the Court went on to say that, if "the ICC erred in failing to prepare a separate formal environmental impact statement to accompany its October 4, 1972, report or that the consideration given to environmental factors in that report

was inadequate, the ICC need *not* have 'started over again.'" *Id.* at 321 (emphasis in original). Rather, a later consideration of environmental factors by the Commission before issuing its final order of approval would adequately accomplish NEPA's purpose. *Id.* at 322.

The Supreme Court in *Aberdeen* had before it a record demonstrating that full attention was eventually paid to environmental considerations; whereas in the present case, the FPC has not yet made such a record. But that difference is not determinative. What is important is the approach taken by the Court in reconciling two potentially conflicting Congressional mandates—(1) that an agency not postpone those urgent decisions which its special qualifications require it to make in the public interest, and (2) that environmental considerations be taken account of to the fullest extent possible. Because of the breadth of scope and extent of permissible revision allotted to the Administrative Law Judge by the FPC on remand from that Commission, which we here sustain and emphasize, we believe the better course is to follow the example set in *Aberdeen*. The issuance of Order No. 697 (as modified by 697A) should not be held up pending an environmental impact statement.

VII. Contract Abrogation

Several petitioners object that the permanent curtailment plan, is allocating natural gas solely according to end-use, has improperly ignored the agreements reached by the parties themselves. The focus of complaint is that users are no longer characterized as firm or interruptible, with the former having priority over available natural gas supplies, and paying a higher price for that privilege.[15]

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[15] As pointed out at oral argument, the customers being referred to are eventual users. Gas distributors are all interruptible to some degree, but can safely guarantee firm service to a certain number of eventual customers desiring it.

But this argument is not new. It was raised in challenging the interim curtailment plan before this court in *ASARCO*, which was also an end-use plan. *ASARCO, supra*, 161 U.S.App.D.C. at 16, 17, 494 F.2d at 935, 936. Both the legal permissibility of relying on end-use as an allocative scheme, and the substantiality of the evidence underlying the FPC's choice of the end-use method on the El Paso system, were upheld. In *Louisiana Power and Light, supra*, the Supreme Court held that the Natural Gas Act "fully authorized" the pipeline's tariff to impose a curtailment plan despite contrary terms in existing contracts and in so holding distinguished *United Gas Pipe Line Co. v. Mobil Gas Service Corp.*, 350 U.S. 332, 344 (1956). *See* 406 U.S. at 646-647.

In Opinion No. 697, the Commission relies on the fact that regulations of the California Public Utilities Commission require natural gas service to be interruptible for industrial customers over 200 mcf per day. As a result, the informative function of an interruptible, as opposed to a firm contract, is somewhat distorted. It is not the free market allocating to the most productive user because that user can pay the highest price, but a government-imposed constraint upon the free market whereby at least some California users who would have paid to be firm-customers are subject to curtailment before EOC users. (J.A. 421-421; Tr. 16,595-96).

It is not material, as petitioners urge on this court, that an actual instance of curtailment of California residential users in the face of continuing EOC industrial use has not yet arisen. The Commission acts within the scope of its discretion when it considers contingencies, for that is the nature of the emergency curtailment plans originally required by Order No. 431.

While fully within its authority in establishing categories of end use, the Commission still paid slight attention to the efficient allocation reflected in firm and

interruptible contracts. The Commission explicitly held that it was abrogating existing contractual entitlements only because and to the extent that they were not effectively serving this allocative function. (J.A. 422, Tr. 16596). As the Commission has impliedly adopted the premise that, in the absence of evidence of distortion, the distributive scheme worked out by private parties will accomplish the most efficient allocation of scarce resources, its declaration of priority categories based on end use should allow for private contractual arrangements. Within end-use priority categories, there is still room for individual contracts to spring up, with some users requesting priority over others, and being willing to pay for it. Such arrangements would evidence that the parties themselves have agreed on a common unit for measuring their self-perceived needs. Hence, for example, if one manufacturing plant is able rather freely to substitute between natural gas and other fuels, it would not be willing to pay as much for the gas as would a second manufacturer whose operations entirely rely on energy from natural gas. Yet, under Opinion No. 697, both would be classified in Priority 3.

The Commission's present order should be read to allow natural gas consumers to contract for firm or interruptible fuel *within* priority classifications until the Commission rules otherwise. That interpretation is not precluded by any position taken by the FPC in its Opinion No. 697; rather, it is a necessary consequence of the Commission's statement that "the value of the 'firm-interruptible' contract distinction as a curtailment standard is thus largely dependent upon the accuracy with which it reflects the intensity of purchaser's need for gas." (Opinion No. 697, J.A. 422, Tr. 16596). To the extent that the California regulations require all service to be interruptible, the Commission in some areas may desire to prohibit consumers from contracting for firm service even within priority categories. But that

would only affect industrial use in excess of 200 mcf daily; and would require an explicit ruling by the Commission, if it so desires, on remand. For the present, nothing in Opinion No. 697 or 697A should be read to prohibit such contracting within priority categories.

VIII. Compensation

The permitting of contractual arrangements within end-use categories could also accomplish part of the purpose intended by those distributors, like Arizona Electric Power Company, who advocate that the Commission order a scheme of compensation from previously interruptible users who now enjoy a high priority classification to be paid to users whose needs are now classified in the lower categories. It is contended that such a system is obligatory in order to avoid discrimination in the new curtailment plan.

A question of jurisdiction is presented. The Commission holds that its authority to set rates under section 4 of the Act does not encompass the ability to require compensation payments from one class of users to another. That position has been squarely rejected by the Fifth Circuit. *Mississippi Public Service Commission v. FPC*, 522 F.2d 1345, 1350 (1975), *cert. denied*, 429 U.S. 870 (1976). The question was also recently before a panel of this court in the context of the Transcontinental Gas Pipe Line curtailment. After vacation of our order and remand of the case from the Supreme Court, *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976), the majority ordered a remand to the Commission to provide the evidence it felt was needed concerning the severity of the natural gas shortage before it could rule on the validity of the suggested compensation payments. *Transcontinental Gas Pipe Line Corporation v. Federal Power Commission*, —— U.S.App.D.C. ——, —— F.2d ——, No. 74-2036 (D.C. Cir., Nov. 29, 1976).

The suggestion for compensation payments is made in an entirely general way, with no specific plan proposed by the petitioners. Without judging the issue as it might be presented in a particular case of hardship (for which the Commission alway stands ready to afford individual relief), the concept of a scheme of compensation cannot be decided on this record. It is only proposed in a general manner; and as a general proposal, it would be inconsistent with the entire purpose behind reallocation of natural gas to order compensation payments. More narrowly, all we hold is that nothing in the Natural Gas Act's instructions to the Commission to promulgate nondiscrimnatory rates *requires* a compensation scheme.

A freely operating market would allocate natural gas first to those paying the most for it. It is the mandate of the Commission to intrude into that process where the social valuation on a particular use for natural gas exceeds the value to any one private person. To then force the private persons receiving the direct benefits from that reallocation to pay to the formerly favored users the difference in price between the favored and disfavored uses, however, defeats the entire rationale for the reallocation. If the newly favored users could afford to pay this compensation, they would in most instances have paid it at the start, and would have outbid the formerly favored users.

The California users could perhaps present a different case. There, an interruptible user might actually have placed a high value on the use of natural gas, but pays the lower rate in keeping with the interruptible status of industrial users over 200mcf in California. Such a user, however, could not be in any priority above level 3; so it is quite unlikely that he would be enjoying a windfall benefit for which he should be forced to compensate the EOC users. The FPC was not required to order such compensation.

We dispose of the compensation issue on this ground: that it is not required by the Natural Gas Act in order to avoid discrimination, that as a general matter, it would contradict the whole purpose for the end-use plan, but that the Commission will be free to consider compensation in particular cases subject to court review. We thus find it unnecessary in this case to reach the question of whether the Commission has jurisdiction to require compensation.

IX. End-Use Data

In making its allocations of natural gas to the distributors, El Paso has determined for each the amount of gas consumed within priority categories. To accomplish these calculations, it was necessary to rely on information furnished by the ultimate consumers as to the uses each made of natural gas. Arizona Electric Power Cooperative and the City of Willcox object to that method, especially because, "Since these nominations were made after El Paso's customers first suffered curtailment, they may well be tainted by self-serving exaggerations of requirements in higher priorities." (Brief for Petitioners City of Wilcox and Arizona Electric Power Cooperative, Inc. at 53). The preferable practice, in petitiners' estimation, would be to require El Paso to obtain from each distributor actual data on residential, commercial, and industrial use of the natural gas furnished that distributor, and to subject those figures to cross-examination by competing distributors.

As large boiler users with firm contracts under the old scheme, such petitioners fear being reduced from top priority to near lowest priority in almost all of their natural gas allocations. It is expectable, accordingly, that they would like to scrutinize with the utmost care the claimed needs of distributors serving predominantly superior-priority users. But the decision of the Commission being challenged here is of the type to which courts customarily

accord a good deal of respect. It is not as though the Commission wishes El Paso to proceed without any data at all. If it had so ordered, that might have been so disruptive to the effective functioning of the Act as to have constituted an error of law. At the least, substantial evidence might well have been found lacking.[16] But the Commission has here merely chosen a method of obtaining the data necessary to implement its end-use curtailment plan. Absent a strong showing of unworkability, methodology is best left to an enforcing agency's own determination.

In the United Gas Pipe Line curtailment plan, reviewed in *Louisiana, supra*, the Commission did suspend the effective date of the end-use plan in order to obtain its own measurements of natural gas utilization by priority category. United Gas and El Paso could be distinguished on the basis of the high number of complaints received by the Commission in the former and, a related point, the relative novelty of the proposed plan compared with the plan that was already in force in *United*. However, on a matter of logistics rather than a rule of law, or even an agency's interpretive policy, the need to enforce consistency is much reduced. It is sufficient to hold that the Commission has taken a position that is not arbitrary, capricious, or an abuse of discretion in the El Paso curtailment plan. The position is that distributors' "nominations" will be presumptively accurate.[17] Should petitioners single out specific evidence of substantial abuse, where the "nominations" of natural gas use were fraudulently or negligently different from the priority classifications to which the natural gas was ac-

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[16] 15 U.S.C. § 717r(b) (1970) provides in part: "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

[17] The presumption can be overcome in a hearing upon a motion by any gas distributing company, in accordance with 15 U.S.C. § 717d(a) (1970).

tually being put, then the Commission would be required to reconsider whether the "nomination" procedure was reliable.[18] At an earlier part of this opinion, we have relied (to the benefit of the petitioners) on the presumption the Commission's orders would not be evaded, and that it was impermissible for the designation of particular end use to turn on the unsubstantiated expectation of fraud.[19] This same presumption must operate here.

Also, any new program of estimation is likely to involve some inaccuracy. Given the wide range of consumers involved, the extensive geographical areas where they are located, and the magnitude of the operation, such result would be inevitable. The Commission, in its December 24, 1975, order, refused AEPCO's request to challenge SoCal gas nominations, admitting, "Although the data supplied with respect to SoCal is deficient, there is presently neither an allegation nor any evidence of error or impropriety with regard to its data or the data of PG & E." (Brief for Respondent at Appendix D, p. 11). This court agrees with the Commission that "[i]n the absence of such an allegation or evidence, we find no basis for requiring an investigatory hearing. . . ." (*Id.*)[20]

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[18] *See* note 17.

[19] See discussion of gas turbines, p. 24, *supra*.

[20] Subsequent to oral argument, petitioners Willcox and AEPCO submitted a memorandum pointing to what they considered to be an erroneous submission of evidence by one distributor, Arizona Public Service Company. In a special hearing on ignition and flame stabilization, APS had submitted an estimate of annual gas use equal to its maximum daily use multiplied by 365. On direct examination, the Company's attorney stated that a realistic estimate for annual use was many times less than that. Although heralding this as evidence of an egregious inconsistency requiring the adoption of formal actual use surveying, AEPCO has merely located one example, among many that are inevitable, of a misunderstanding between data requested and data furnished. Had APS been bent on fraud, it is doubtful that it would have attempted

it on so grand a scale as to receive 23 times the amount to which it was entitled of natural gas in the high priority use. Perhaps such errors would be noticed more frequently if adverse parties were permitted to challenge data submissions, but it is for the Commission to weigh that likelihood against the burden of adversary proceedings on such minute details.

[21] Falsification of information required by the Federal Power Commission to be furnished to El Paso would constitute a violation of 15 U.S.C. § 717t(b) (1970): "Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs."

Such conduct might also result in wilfully causing El Paso to make a false statement to the United States Government in violation of 18 U.S.C. § 1001 (1970).

It is no error to proceed under the assumptions that the laws against fraud are being obeyed,[21] and that the possibility of innocent errors may be weighed against the delays and costs of detailed hearings.

X. Conclusion

It is with great reluctance that this court remands the instant case for still more deliberation by the Federal Power Commission. This would not have been necessary, in large part, had the orders of this court in *ASARCO* been fully complied with. The Commission has itself realized, however, that Opinion No. 697 (as modified by Opinion No. 697A) is not ready for implementation as a permanent plan because of the need for resolution of the environmental issues. The Commission will now have more issues to concern itself with during those deliberations. But that could be advantageous in allowing a greater freedom, as a practical matter, to structure a curtailment plan with more concern for environmental matters from the ground up, rather than as an afterthought.

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We have carefully considered the many challenges raised against the El Paso curtailment plan, but have not devoted particular attention in this opinion to all of them. It is our decision that any challenges not specifically addressed be dimissed as insubstantial. This case is remanded to the Federal Power Commission with instructions to implement the holdings of this opinion in revising Opinion 697 (as modified by Opinion No. 697A). In brief summary,[22] those holdings are:

1) fuel devoted to ignition and flame stabilization must receive Priority 2 status (Part II);

2) electricity generating turbines must not be classified with boilers, in Priorities 4 and 5, but are entitled to a higher priority (Part III);

3) attachments of new users up to December 19, 1974, must be incorporated in measuring uses by priority classification during the base period (Part IV);

4) pre-existing shortages of natural gas in California during the base period must be considered in determining California's volumetric entitlement (Part IV); and

5) gas used from storage facilities must be taken into account (i) to the extent its source has been from El Paso, (ii) in proportion to the actual end use of such storage gas, (iii) and with safeguards against according priority to gas both as it is pumped into storage and as it is withdrawn therefrom (Part V).

So ordered.

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[22] To the extent that the following are abbreviations of directions outlined in greater detail above, the more complete directions shall prevail.

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BAZELON, *Chief Judge, concurring in part, dissenting in part*: I agree with the result reached by the majority, remanding the El Paso final curtailment plan to the Federal Power Commission, and concur generally with much of its opinion. I take exception, however, to the majority's discussion of three specific elements of the plan:

1) *Utilization of Gas for Electric Turbines*

In Opinions No. 697 & 697-A, the Commission has determined that the use of natural gas as boiler fuel should have a lower priority than other end uses; the Commission has also determined that the use of gas to power turbines which generate electricity should be considered boiler-fuel use, and accorded the same low priority. The majority affirms the priority given boiler fuel, but rejects the Commission's conclusion with respect to gas used in turbines for electric generation. I would affirm both portions of the Commission's decision. As the majority points out, Maj. Op. at 13, the Commission has found that turbine use is even less efficient than other sorts of "boiler fuel" use. J.A. 100. Since, as the majority virtually concedes, this finding is supported by substantial evidence, the Commission's decision must be affirmed. *See Mobil Oil Co. v. FPC*, 417 U.S. 283 (1974).[1]

The challenge to the Commission's decision with respect to turbine use was raised principally by Arizona Electric Power Cooperative [AEPCO], which, in its brief, repeatedly refers to its situation as "unique." Whatever injury AEPCO has suffered because of its allegedly unique situation could be adequately redressed by reclassification or an increased gas allotment, if appropriate, by petitioning for extraordinary relief.

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[1] Without in any way urging it as a ground for decision, I note that the proposed national energy policy, S.1468, 95th Cong., 1st Sess. (1977), favors conversion from natural gas to coal by utilities engaged in the generation of electricity.

2) *Pre-existing Shortage in California*

I agree with the court that remand to adjust base period data to account for after-acquired attachments of new (mostly high priority) users up to December 19, 1974, is proper. However, I disagree with the majority that the Commission's consideration of pre-existing shortages of local and non-El Paso gas in California was insufficient, Maj. Op. at 15-16, and I see no need for remand for further consideration of that issue.

The record shows that the two California customers of El Paso, Pacific Gas & Electric Company and Southern California Gas Company, were partial requirements customers of the pipeline; that is, both had other suppliers than El Paso during and before the base period for computing volumetric entitlements. As the court acknowledges, Maj. Op. at 21, the Commission in Opinion No. 697 specifically discussed the question of pre-existing shortages suffered by these partial requirements customers due to reduced deliveries by their other suppliers. J.A. 434-39. However, the court feels that consideration fell "far short of providing a basis for justifying the FPC's failure to provide some relief to the California users. . ." Maj. Op. at 21.

Unlike the majority, I believe the Commission has complied with the terms of our remand in *American Smelting & Refining Co.* v. *FPC*, 494 F.2d 925, 942 (D.C. Cir. 1974, *cert. denied*, 419 U.S. 882 (1974) [*ASARCO*]. The *ASARCO* court required that the Commission "conider the pre-existing shortages in California and . . . enunciate findings with respect to that situation." *Id.* The Commission has responded by reviewing the matter and relying upon two rational policies developed earlier and consistently applied here.

In Opinion No. 697 the Commission cited its earlier Opinion No. 647, in which it enunciated an approach of "allocat[ing] the impact of curtailment equally, insofar

as may be possible, upon full and partial requirements customers treating both in the same manner." J.A. 435, citing Opinion No. 647, at 14. The Commission therein noted:

> modification of our treatment of partial requirements customers might be necessary to protect small volume residential service in the event of extraordinarily severe shortages requiring curtailment in the highest priority categories.

Id. Under this exception for severe hardship, some full or partial requirements customers of a curtailed pipeline would be more severely curtailed so that a partial requirements customer could offset other shortages. Here, however, the Commission found:

> In reviewing the record in the instant proceeding, we find no indication that the reduced supplies available to the California partial requirements customers from sources other than El Paso, in combination with a curtailment of entitlements from El Paso prorated equally . . . will result in a shortage of such severity as to warrant special treatment for the partial requirements customers.

J.A. 435. Moreover, the Commission has indicated that its general policy for regulating curtailments[2] contemplates pipeline-by-pipeline regulation. Therefore, a partial requirement customer impacted by curtailment on each of its supplier pipelines cannot ordinarily expect any one of those suppliers to make whole the customer's shortfall. Because a partial requirements customer's expectations from any given supplier may respond elastically to shortages and oversupply, the Commission has chosen here to base future entitlements upon past volumes taken from El Paso. It subverts the Commission policies of equal curtailment of full and partial requirements customers and pipeline-by-pipeline regulation to suggest, as the court

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[2] Orders 467 & 467-B, codified as 18 C.F.R. § 2.78.

does, that the two California customers' historic takes must now be disregarded in favor of spongy estimates of the volumes which would have been taken had customers been allowed to lean more heavily upon El Paso to overcome other supply shortages.

This court recently affirmed a Commission decision not to permit a municipality to interconnect with an interstate pipeline and thereby obtain an allocation of its gas offsetting curtailments by the municipality's own interstate pipeline supplier. *City of Huntingburg* v. *FPC*, —— F.2d —— (D.C. Cir. No. 75-2152, April 26, 1977). As applied to a partial requirements customer of several interstate pipelines, that decision seems to buttress the Commission policy of pro rata curtailment of all customers by pipeline within end-use categories. Because California customers could use or procure alternative fuels to make up their deficits, and were not in a worse position to do so than East-of-California customers, the Commission refused to permit exception to its policy against allowing adjustments to the El Paso entitlements to take up the slack. This, it seems to me, was reasonable and comports with the decision in *Mobil, supra.* I would affirm the Commission on this issue.

3. *Compensation*

I find most troubling the majority's extended discussion of "compensation schemes"—i.e., plans whereby those pipeline customers who are relatively less affected by curtailment would be required to provide cash compensation to those customers relatively more affected. I agree with the majority's narrow holding on this subject, namely, that in the absence of a definite plan offered (or agreed to) by the parties, the Commission did not err in refusing sua sponte to fashion a compensation plan. In my view, however, much of the majority's discussion of compensation is irrelevant to this case, and unnecessary to its holding. In particular, I see no need for

us to reach the broader issue—with which we grappled in *Transcontinental Gas Pipe Line Corp.* v. *FPC*, —— F.2d —— (D.C. Cir. No. 74-2036, *et al.*, November 29, 1976) [*Transco*]—of whether the Commission has authority under the Natural Gas Act to approve and regulate compensation among distributor customers of a jurisdictional pipeline. The issue raised in *Transco* was permissive in nature—*i.e.*, does the Natural Gas Act *allow* compensation which has been agreed to by the parties, or does it flatly bar it on jurisdictional grounds? The majority there held that factual material about the nature and duration of shortage was necessary to guide the court in its interpretation of the stautory standards of "just and reasonable" and "non-discriminatory" rates in the novel context of alleged extreme shortage and allocation by end-use priorities. Here, the question posed is a simpler mandatory one: Does the Act *require* compensation in conjunction with end-use curtailment, and does it therefore preclude the Commission from approving a final curtailment plan based upon end-use without providing compensation? I have little difficulty answering this latter question in the negative, and I therefore join the court's holding that "nothing in the Natural Gas Act's instructions to the Commission to promulgate nondiscriminatory rates requires a compensation scheme," where the Commission believes justice can be done without one, and none has been endorsed by the parties.

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2123

CITY OF WILLCOX AND ARIZONA ELECTRIC POWER COOPERATIVE, INC., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
SAN DIEGO GAS & ELECTRIC CO., ET AL., INTERVENORS

No. 75-1019

ARIZONA PUBLIC SERVICE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
SAN DIEGO GAS & ELECTRIC CO., ET AL., INTERVENORS

No. 75-1062

NEVADA POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
AMERICAN SMELTING & REFINING CO., ET AL.,
INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 75-1245

PACIFIC GAS AND ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
SOUTHERN UNION GAS CO., ET AL., INTERVENORS

No. 75-1246

SAN DIEGO GAS & ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
SOUTHERN UNION GAS CO., ET AL., INTERVENORS

No. 75-1247

SOUTHERN CALIFORNIA GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
SAN DIEGO GAS, ET AL., INTERVENORS

No. 75-1248

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
NEVADA POWER CO., ET AL., INTERVENORS

On Motions for Clarification and/or Stay
and on Petitions for Rehearing

Filed August 18, 1977

Before BAZELON, *Chief Judge*, and TAMM and MACKINNON, *Circuit Judges*.

Arnold D. Berkeley was on the motion of Petitioners, City of Willcox and Arizona Power Cooperative, Inc., for stay of second interim curtailment plan.

Thomas D. Clarke was on the response of Petitioners, Southern California Gas Co., to motion for stay of second interim curtailment plan.

Drexel D. Journey, Allan Abbot Tuttle, and *Thomas M. Walsh* were on the responso of Respondent, Federal Power Commission, to motion for stay.

Arnold D. Berkeley was on the reply of Petitioners, City of Willcox and Arizona Electric Power Cooperative, Inc., to oppositions to the motion for stay of second interim curtailment plan.

Thomas D. Clarke was on the answer of Petitioner, Southern California Gas Company, to reply to Petitioners (City of Willcox and Arizona Power Cooperative, Inc.) for stay of second interim curtailment plan.

Joel L. Greene and *Richard H. Silverman* were on the motion of Intervenor, Salt River Project Agricultural Improvement and Power District, for clarification of court's opinion.

Arnold D. Berkeley was on the petition for rehearing of Petitioners, City of Willcox and Arizona Electric Power Cooperative, Inc.

Thomas D. Clarke was on the petition for rehearing of Petitioner, Southern California Gas Company.

Malcolm H. Furbush and *Howard V. Golub* were on the petition for rehearing of Intervenor, Pacific Gas and Electric Company.

C. Frank Reifsnyder and *George W. Wise* were on the petitioner for rehearing of Intervenor, El Paso Natural Gas Company.

ORDER

Upon consideration of the motion of petitioners in Appeal No. 74-2123 for stay in the second interim curtailment plan, the responses thereto, said petitioners' reply, and the answer of petitioner, Southern California Gas Company to the reply, it is

ORDERED, by the Court that the motion for stay is denied for the reasons set forth in the opinion for the court filed this date.

Per Curiam

ORDER

Upon consideration of the motion of Intervenor, Salt River Project Agricultural Improvement and Power District for clarification of this court's opinion, it is

ORDERED, by the Court, that the motion is denied for the reasons set forth in the opinion for the court filed this date.

Per Curiam

ORDER

Upon consideration of the petitions for rehearing filed by Petitioners in Appeal No. 74-2123 and by Intervenors, El Paso Natural Gas Co., and Pacific Gas and Electric Co., it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam

Opinion for the Court filed by *Circuit Judge* MacKinnon.

MacKinnon, *Circuit Judge*: On June 30, 1977, this court decided *City of Willcox, et al. v. Federal Power Commission*, No. 74-2123 et al. In that case, we reviewed an interim curtailment plan for deliveries of natural gas on the El Paso Natural Gas System. This plan, which was formulated in Federal Power Commission Opinion Nos. 697 and 697A, was found deficient in five respects. We remanded the case to the Commission with instructions to implement our holdings regarding those deficiencies. Slip Op. at 56.

On June 1, 1977, the Commission issued *Order Denying Rehearing and Accepting Tariff Sheets*, which had the effect of directing the implementation on July 1, 1977 of the interim curtailment plan which was the subject of our June 30, 1977 opinion. On July 14, 1977, the City of Willcox (Willcox) and Arizona Electric Power Cooperative, Inc. (AEPCO) petitioned this court to stay the FPC's June 1, 1977 order.

On July 12, 1977, Salt River Project Agricultural Improvement and Power District (Salt River) presented a motion for clarification of our June 30, 1977 opinion. Several other parties have also each petitioned for rehearing on certain aspects of our opinion.[1]

We take judicial notice of the FPC's *Order Denying Motion for Stay, Granting Rehearing, Modifying Curtailment Plan, Establishing Further Hearings, Consolidating Hearings, and Requiring Action to Obtain Remand of Record*, issued July 29, 1977. The Commission ordered the interim curtailment plan developed in Opin-

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[1] These parties are Willcox, AEPCO, Pacific Gas and Electric Co., and El Paso Natural Gas Co.

ion Nos. 697 and 697A [2] to remain in effect, subject to certain modifications we ordered in *City of Willcox*. Specifically, the Commission directed that fuel devoted to ignition and flame stabilization remain in Priority 2 status [3] (*see* Slip Op. at 18-20, 56); that electricity-generating turbine fuel be placed in Priority 3 rather than Priorities 4 and 5 (*see* Slip Op. at 20-25, 56); and that attachments of new residential and commercial users up to December 19, 1974 be included in base period requirements (*see* Slip Op. at 26-29, 33, 56). The Commission also directed that hearings be held to provide a record for determining (1) whether electricity-generating turbine fuel should be reclassified from Priority 3; (2) whether Arizona Public Service Co. and Tucson Gas and Electric Co. were dilatory in obtaining state permission to reject new customers after December, 1974, and whether an additional base period adjustment should be permitted these customers for attachments occurring between December 19, 1974 and the date of state imposition of a new attachment moratorium (*see* Slip Op. at 29, 33); (3) how to take into account pre-existing shortages of natural gas in California during the base period when determining California's volumetric entitlement (*see* Slip Op. at 25-34, 56); and (4) how to allocate storage injection volumes in accordance with the requirements we elucidated in *City of Willcox* (*see* Slip Op. at 34-38, 56). In short, as a result of the Commission's July 29, 1977 order, all of the modifications of the interim curtailment plan that we ordered in *City of Willcox* have either been implemented or will be the subject

[2] Opinion Nos. 697 and 697A were clarified in orders issued December 24, 1975, October 15, 1976, and June 1, 1977.

[3] Fuel devoted to ignition and flame stabilization was placed in Priority 2 status by *Order Denying Rehearing, Further Clarifying Opinions, and Requiring Modification of Proposed Tariff Sheets*, issued October 15, 1976, Paragraph (E).

of hearings to determine how they should be implemented.

We now turn to the various motions and petitions. Salt River, AEPCO, and Willcox, in their motions for clarification and/or stay, urge that electricity-generating turbine fuel be reclassified to Priority 3 from Priorities 4 and 5. Because the Commission has already implemented this reclassification, the motions of these parties for this modification are moot and are therefore denied.

As an independent ground for a stay of the interim curtailment plan, Willcox and AEPCO assert a great interest in lowering the California users' storage priority, pending the Commission's compliance with our mandate to establish a storage priority scheme whereby "the priority accorded to natural gas kept in storage be in proportion to the eventual end uses of that gas . . . ." Slip Op. at 38. The FPC's July 29, 1977 order directs that hearings be held on this specific matter. It has scarcely been two months since our decision in *City of Willcox*; accordingly, we believe it would be premature to interrupt the Commission's deliberations at this time. The Commission has recognized that it cannot implement the plan described in Opinion Nos. 697 and 697A on a permanent basis without modification. This is evidenced by the fact that the Commission has altered the plan in certain respects already and is taking steps to gather information with which other modifications can be made. Under the power conferred on the Commission "to prescribe . . . such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions" of the act,[4] it is open to the Commission

[4] The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations

to order appropriate interim priorities pending further hearings. The Commission here is dealing with a tariff; in such matters, the statute vests the Commission with the discretion to allow the tariff to become effective immediately or to suspend. The discretion conferred recognizes the acquired knowledge and experience of the agency in matters committed to its regulation and is a sufficient basis for recognizing its authority to prescribe interim priorities during the short period preceding hearings on storage volumes and the other matters awaiting implementation.

It should also be realized that none of the present petitioners alleges that a curtailment of natural gas is currently in effect. Lower priorities which certain users might enjoy until the Commission completes hearings and orders further modification will have no deleterious impact unless curtailment actually occurs.[5] Should cur-

may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

15 U.S.C. § 717o (1970).

[5] Should it be determined by the Commission after hearings that the California users' storage priority is too high, the Commission can order reallocation in accordance with its new findings.

tailment occur and El Paso cut off any user entitled by the opinion of this court not to be cut off, that party could either petition the Federal Power Commission to implement our opinion, in keeping with 15 U.S.C. § 717 s(a) (1970),[6] or following denial of rehearing seek an immediate stay from this court should the Commission not choose to proceed, under 15 U.S.C. § 717r(a) (1970).[7]

[6] (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

15 U.S.C. § 717s(a) (1970).

[7] (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made

In the latter instance, the "order" by which the complainant would be "aggrieved" would be the Commission's approval of the interim curtailment plan. However, until there is actual curtailment, or at least a more than speculative threat that the Commission will not abide by our opinion in the event of curtailment, no party is presently "aggrieved."

Granting the motion to lower immediately the California users' storage priority would constitute precedent for petitioning this court for advisory opinions as to how our decision might apply to various parties. Such decisions are not permitted. No case of immediate harm is presented, and the proper procedure is to afford the Commission the opportunity to implement the decision of this court.

We also take this opportunity to clear up a possible ambiguity, concerning storage gas, that has been pointed out by Pacific Gas & Electric Co., El Paso Natural Gas Co., and Southern California Gas Co. Nothing we have said in our June 30, 1977, opinion should be taken to prevent the Commission, on remand, from finding that storage gas serves high priority uses. The point made in our opinion of June 30, 1977, was simply that, to the extent storage gas is made available to higher priority uses, more non-storage gas will be available to the lower priority uses. We reiterate our holding on storage utilization of natural gas:

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application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

15 U.S.C. § 717r(a) (1970).

> In revising its permanent curtailment plan for the El Paso system, the Commission must guarantee: 1) That all use of El Paso-originating natural gas (whether detained in storage for a period of time or not) be recognized in setting the percentage reliance of California customers upon El Paso. 2) That double counting be avoided either by considering the El Paso origin of the natural gas as it is injected into storage, or as it is withdrawn from storage, but not both. 3) That the priority accorded to natural gas kept in storage be in proportion to the eventual end uses of that gas, unless the Commission wishes to support with an evidentiary hearing the importance of storage gas irrespective of the end use to which it is eventually put.

Slip op. at 38. This clarification obviates any need for rehearing.

The motions of Salt River, Willcox, and AEPCO for clarification and/or stay are denied. The motions of Willcox, Pacific Gas & Electric Co., El Paso Natural Gas Co., and Southern California Gas Co. for rehearing are denied.

Order accordingly.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CURTAILMENT

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer, and Don S. Smith.

El Paso Natural Gas Company) Docket No. RP72-6

OPINION NO. 697
OPINION AND ORDER PRESCRIBING PERMANENT CURTAILMENT PLAN

(Issued June 14, 1974)

NASSIKAS, Chairman:

This proceeding is concerned with establishing a just and reasonable curtailment plan on the El Paso system.

In reviewing the various decisions rendered by Presiding Administrative Law Judge Arthur Fribourg in this docket, principally the initial decision of June 5, 1973, we find that certain modifications are required as shall be hereinafter addressed.

Procedural Background

On July 6, 1971, El Paso Natural Gas Company (El Paso) tendered for filing proposed changes in its FPC Gas Tariff to provide new priorities of service on its Southern Division System in the event that shortage of gas supplies required the curtailment of gas deliveries to its customers.

By an order issued August 5, 1971, the Commission suspended the proposed tariff sheets until January 6, 1972, ordered a hearing on the matter and granted interventions. Hearings to determine the justness and reasonableness of the

proposed curtailment plan commenced November 9, 1971, and continued intermittently until May 18, 1972. After the hearings on the permanent plan, but before briefing was completed, El Paso, on August 17, 1972, filed a motion requesting the Commission to issue an emergency order prescribing an interim curtailment plan for the period beginning November 1, 1972, until issuance of a final Commission order prescribing a permanent curtailment plan for El Paso.

In response to a motion on August 24, 1972, by Salt River Project Agricultural Improvement and Power District, the Commission, by an order issued September 1, 1972, authorized a limited reopening of the record for

purposes of determining the need for an interim curtailment plan on El Paso's Southern Division System and the form such plan should take if found to be needed.

A hearing on the interim plan commenced September 12, 1972, and ended September 25, 1972. On October 2, 1972, the Commission granted El Paso's motion to omit the intermediate decision. On October 31, 1972, the Commission issued Opinion No. 634 prescribing an interim emergency curtailment plan for El Paso for the period November 1, 1972, through October 31, 1973, or until the date of a final Commission order, whichever came first. Opinion No. 634-A, "Opinion and Order Clarifying Opinion, Denying Motion for Stay, and Denying Rehearing", was issued on December 15, 1972.[1]

On August 18, 1972, the City of Willcox, Arizona, and Arizona Electric Cooperative (AEPCO) filed a motion for extraordinary relief requesting exemption from El Paso's

[1] On appeal, affirmed in part and reversed and remanded in part, *American Smelting and Refining Co., et al.* v. F.P.C., —— F.2d ——, (D.C.Cir., January 21, 1974).

curtailment plan on the ground that alternate fuel supplies were unavailable to AEPCO, thereby endangering the reliability of electric service to its customers. The motion was denied by the Commission in Opinion No. 634, but allowance was made for the filing of a new petition at a later time if AEPCO could make a more persuasive showing. AEPCO filed an amended motion on November 30, 1972, followed by a hearing on January 30, 1973, and denial of the motion by Presiding Law Judge Fribourg in an initial decision issued March 19, 1973.

Meanwhile on December 15, 1972, the permanent curtailment plan initially briefed to the Presiding Judge. Reply briefs were initially due to be filed on January 15, 1973, but were postponed after a motion by El Paso requesting that a conference of all the parties herein be held to discuss the impact on the instant proceeding of Order No. 467, the Commission's policy statement issued on January 8, 1973, which set forth priorities of deliveries to be followed by jurisdictional pipelines during periods of curtailment. On February 6, 1973, the Presiding Judge ruled that Order No. 467 did not require a reopening of the record and that the briefing schedule should be resumed. The Presiding Judge did rule, however, that the impact of Order No. 467 was a relevant matter for consideration in the reply briefs and that a third brief limited solely to this issue was appropriate. Consequently, reply briefs were filed on March 16 and responses to issues raised by Order No. 467 were filed on March 30, 1973

An initial decision on the permanent curtailment plan was rendered by Presiding Administrative Law Judge Fribourg on June 5, 1973. The record remained open pending resolution of two ancillary phases of the case, to wit, issues raised by the petition of the City of Mesa, Arizona, for extraordinary relief from the operation of the interim curtailment plan, and the issues raised by Arizona Public Service Company, *et al.*, as to the grouping of delivery point obligations for purposes

of the permanent curtailment plan. An initial decision on the petition for extraordinary relief by the City of Mesa, Arizona, was subsequently rendered on June 27, 1973, followed thereafter by an initial decision on the grouping of delivery points, on September 19, 1973.

By order of October 18, 1973, the Commission extended the operation of the interim curtailment plan pending further action of the Commission on the permanent curtailment plan. Applications for rehearing and reconsideration of the Commission's October 18, 1973 order extending operation of the interim plan were filed by Pacific Gas and Electric, Southern California Gas Company, San Diego Gas and Electric, the People of the State of California and the Public Utilities Commission of the State of California. An order granting rehearing for the purpose of reconsideration of the October 18, 1973 order was granted by Commission order of December 3, 1973.

By order of October 25, 1973, the Commission denied a joint petition for extraordinary relief filed by the Department of Water and Power of the City of Los Angeles and Southern California Edison. Applications for rehearing the October 25, 1973 order filed by the petitioners and the State of California and the California Public Utilities Commission were denied by Commission order of December 20, 1973.

On January 21, 1974, the United States Court of Appeals for the District of Columbia Circuit in *American Smelting and Refining Company, et al.* v. F.P.C., —— F.2d ——, affirmed in part and reversed and remanded in part the interim curtailment plan for El Paso. The court permitted the interim plan to continue in effect for a reasonable period of time pending a decision by the Commission regarding the matters remanded for further consideration. We had determined at the time of the Court's decision that a permanent plan for El Paso virtually identical to the interim plan would best serve the public interest, and were preparing to issue a final order to that effect. However, we could not issue a permanent plan so closely approximating the interim plan without resolving those

aspects of the interim plan which the Court had found to be inadequate. We have therefore reconsidered the interim plan in light of the Court's remand and have made certain revisions to our permanent plan as a result thereof. We thus find it appropriate and expeditious to treat both phases of the proceeding in this opinion.

Priorities of Service

In Order No. 467-B in Docket No. R-469 [2] the Commission expressed its preference for an order of nine curtailment priorities such that users who purchase gas under interruptible contracts are to be curtailed ahead of users who have contracted for firm service. However, certain factual conditions shown by this record to exist on the El Paso Southern Division System persuaded us that the Commission's overriding policy of curtailment based on end-use would be contravened should the priority format of Order No. 467-B, and the "firm-interruptible" contract distinction embodied therein, be imposed on the El Paso system. In our judgment, the manner in which the regulatory policy of the State of California has influenced the development of contractual relationships on the El Paso Southern Division System requires this modification of our policies.

Pursuant to regulations of the California Public Utilities Commission, all contracts of California industrial consumers whose daily requirements of natural gas exceeds 200 Mcf are interruptible contracts. No such limitation on the capacity to contract for firm service exists with respect to the East-of-California (E-O-C) customers.

[2] Order No. 467, Docket No. R-469, issued January 8, 1973, as amended by Order No. 467-A, January 15, 1973, as modified by Order No. 467 B, March 2, 1973.

Although the Presiding Judge failed to rule definitively on the nature of the E-O-C contracts, we find that with exception of certain sales for irrigation purposes, El Paso's E-O-C customers purchase under firm contracts.[3]

Adoption of the Order No. 467-B priorities for the El Paso Southern Division System would result in virtually all the E-O-C industrial customers with requirements in excess of 200 Mcf daily escaping curtailment until such time as California customers with similar requirements had been totally curtailed. By virtue of his firm contract, the E-O-C

[3] The E-O-C contracts give no indication that El Paso is not expressly obligated to deliver certain volumes, nor can the E.O.C. contracts be construed as anticipating or permitting interruption with virtually no notice nor construed as requiring alternate fuel capability. Compare definition of "interruptible service", Order No. 493, Docket No. R-474, issued September 21, 1973 (slip op. at 10).

industrial customer would be entitled to a higher priority curtailment category despite the fact that his use for gas was the same as, or even inferior to, that of his California counterpart. For example, while California industrial consumers were being curtailed, the full contract requirements of the electric generating facilities of Arizona Public Service Company, Tucson Gas and Electric Company, El Paso Electric Company, and the Salt River Project, all of whom purchase under firm direct sales contracts, would continue to be served.

In this context, application of the Order No. 467-B priorities would serve to exalt contract entitlements over end-use considerations, a result at variance with the intent of the Commission in its decision to incorporate the "firm-interruptible" distinction in its order of curtailment pri-

orities. As we stated in Opinion No. 643, *Arkansas Louisiana Gas Company*, Docket No. RP71-122, 49 FPC——, issued January 8, 1973:

> "interruptible sales are for the most part, predicated on end-use considerations; those customers, be they direct sales or indirect sales, who require gas for human needs service or nonsubstitutable industrial service do not contract on an interruptible basis." (Slip op. at 17.)

The value of the "firm-interruptible" contract distinction as a curtailment standard is thus largely dependent upon the accuracy with which it reflects the intensity of a purchaser's need for gas. In California, however, an interruptible contract does not necessarily reflect this intensity of need but rather signifies that the purchaser has complied with the state utility regulations. Under these circumstances, the reliability of the "firm-interruptible" concept as an index of end-use is not easily

demonstrated, particularly, as discussed, *supra*, in light of the disparity in treatment which would be afforded similar E-O-C and California customers if the concept were strictly applied.

A substantially similar conclusion was reached in the initial decision, as evidenced by the manner in which the Presiding Judge conditioned the actual operation of the priority categories set forth therein. Recognizing the inconsistency inherent in a priority format that would permit placement of Nevada Power in a higher priority category than that afforded an electric generating facility in California,[4] the Presiding Judge ruled as follows:

[4] Initial Decision, Docket No. RP72-6, issued June 5, 1973. (slip op. at 15.)

> ". . . if a distributor has a firm contract with El Paso and sells on an interruptible contract for boiler fuel use, the second contract should be treated as firm for purposes of allocation of priorities." (Initial Decision, slip op. at 15.)

El Paso sells to only two California customers, Southern California Gas Company and Pacific Gas and Electric, both of whom are distributors buying under firm contracts. By looking only to the contract between El Paso and the distributor to establish priority classification, the initial decision thus renders all California boiler fuel contracts firm, thereby for all practical purposes eliminating the "firm-interruptible" contract distinction on the El Paso system. Although the Order No. 467-B priority format is retained in the initial decision, its presence serves only a cosmetic function.

While in agreement with the result reached by the Presiding Judge, we view the indirectness of his approach, which we perceive as an effort to preserve at least the *formal* observance of the Order No. 467-B priority format, as unnecessary. Docket No. R-469 policies allow for some flexibility of application:

> "Orders in Docket No. R-469 are not self-operative in pending cases. *Initial decisions, and Commission decisions, will be reached on the record made, applying orders in Docket R-469 policies except where deviation therefrom is required by the evidence.*" (Order No. 467-B, slip op. at 5.) (Emphasis supplied.)

We believe modification of the Order No. 467-B priority categories are warranted by this record and shall there-

fore prescribe an order of priorities based solely on end-use without regard to the firm or interruptible nature of the service rendered. The priority format so prescribed will therefore be virtually identical to that of the interim curtailment plan for El Paso set forth in Opinion No. 634.[5]

Our departure here from the Order No. 467-B curtailment categories should not permit the inference that the Commission is abandoning its position that interruptible uses should be subject to curtailment ahead of all other uses. Rather, we

[5] Opinion No. 634, *El Paso Natural Gas Company*, Docket No. RP72-6, 48 FPC 931, issued October 31, 1972.

are here recognizing that an unbending commitment to the "firm-interruptible" contract distinction on the El Paso system would substantially compromise our fundamental objective of curtailment based on end-use. Moreover, we are not unmindful that the interim plan for El Paso has functioned without a showing of grievous hardship upon any party, a fact which further reinforces our belief that the action taken herein is in the best interest of gas consumers on the El Paso system.

Priorities

In light of the foregoing, the following priority of service categories shall be used during periods of curtailed deliveries on El Paso's Southern Division System:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day).

Priority 2. Large commercial requirements (50 Mcf or more on a peak day), industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day) boiler-fuel use where alternate fuel capabilities can meet such requirements.

The priorities listed above are found to be a just and reasonable classification of markets served directly and indirectly by El Paso. This classification and order of priorities are necessary to provide a uniform identification of end uses upon which to implement natural gas curtailment. Although many variations of classifications and priorities have been urged by the parties, we believe that those specified herein represent a workable, equitable solution to a fundamentally complex problem.

We find residential and small commercial use as the highest priority requirement for natural gas during periods of curtailed deliveries. Residential and small commercial consumers must occupy the top priority because of the magnitude of the problems associated with conversions to alternate fuels by these consumers and because interruption of such service involves very real safety risks which cannot be accepted. The safety risks relate to the inherently dangerous nature of natural gas and logistical problems associated with daily curtailment of large numbers of small volume consumers. Each con-

sumer would require manual turn-off and turn-on service which can be safely performed only by a trained technician. In this respect, the circumstance of loss of service to residential and small commercial consumers is not analagous to loss of residential and small commercial electric power service.

In both Order No. 467-B and in the interim plan for El Paso we found that residential and small commercial use of 50 Mcf or less on a peak day should serve as the demarcation line for Priority 1. The Presiding Law Judge determined that the record did not support a 50 Mcf cut-off point for the permanent plan, but found that a basis did exist for expanding Priority 1 to include small commercial requirements not exceeding 200 Mcf per day. In making this finding, he relied principally upon testimony of Southern Union witness Haseltine, who testified in pertinent part as follows:

> "Our own particular classification of consumers, which incidentially includes more than the three categories envisaged by El Paso's filing, classifies some customers as 'industrial' who for all practical purposes will be such small users of gas that it is an extremely difficult problem logistically and a rather meaningless exercise to curtail them." (Tr. 7079)

Witness Haseltine further testified:

> "A suggested level of cut-off might be in the 200 Mcf per day range. I think anything below that level as a practical matter represents virtually a noncurtailable load and certainly should not be classified in a priority group that would require them to be curtailed with the initiation of the first stages of curtailment." (Tr. 7080)

On the basis of this testimony, for which cross-examination was waived, the Presiding Judge concluded at least as to commercial loads, that a 200 Mcf peak day cut-off point would be appropriate.

In our view, the Haseltine testimony at most indicates (1) that certain industrial customers of Southern Union use quantities of natural gas, and, (2) that in the context of the distribution system about which Mr. Haseltine is most qualified to testify, namely, Southern Union, it is his view that any load below 200 Mcf per day is, as a practical matter, noncurtailable.

Further, we note that the Administrative Law Judge apparently chose to disregard evidence that the use of a 50 Mcf cut-off point would shift to Priority 1 more than 99.7% of PG&E's total class of 145,001 commercial customers. (Tr. 8197) It appears from this evidence that, at least with respect to the PG&E system, the curtailment of commercial customers whose requirements exceed 50 Mcf on a peak day does not pose an unmanageable logistical problem.

In view of the foregoing, serious questions arise as to the propriety of imposing a 200 Mcf cut-off point for all Priority 1 customers on the El Paso system. As discussed, *supra*, we have announced in Order No. 467-B that our decisions in curtailment cases "will be reached on the record made, applying orders in Docket R-469 policies except where deviation therefrom is required by the evidence." (Order No. 467-B, slip op. at 5.) We are unable to find from the evidence in this record that deviation from the 50 Mcf cut-off point for Priority 1 customers as established in Order No. 467-B and implemented in the interim plan for El Paso is required for the permanent curtailment plan. Accordingly, the 200 Mcf. cut-off point for Priority 1 customers, as found by the Presiding Judge, is reversed.

Priority 2 should be maintained as originally established in the interim plan with the exception that requirements for pipeline customers' storage injections should be added thereto. Commercial requirements of over 50 Mcf per day, and industrial requirements for plant protection, feedstock and process needs are all found to be relatively high priority uses of natural gas for which substitute fuels are technologically infeasible as in the situation of process needs, or where curtailment would unduly jeopardize human health or property as in the case of plant protection, or where the natural gas is used as a feedstock for its chemical properties rather than as a fuel. Large commercial requirements are found to be relatively high priority uses on the basis that the applications are usually for space heating, are much smaller volume on the average than industrial consumers, and as such represent higher costs of conversion per unit of natural gas displaced. Furthermore, complete curtailment of commercial consumers, many of which provide essential public services, can result in comparatively servere human health and property damage hardship circumstances when alternate fuel facilities are not provided or alternate fuels are not available. For these reasons, requirements for large commercial users should be equated with the highest industrial priorities during periods of natural gas curtailment.

Natural gas used for injection into storage should also be accorded a relatively high priority as the primary purpose of storage is the protection of service to residential and other temperature-sensitive consumers during the winter heating season. Several parties urged that market requirements should be adjusted to reflect operation of storage, including volumes delivered from storage. We

find that the volumes injected into storage should be treated in the same manner as any other end use of natural gas includable within Priority 2. However, the injection volumes should reflect a netting of storage withdrawals for any particular period in order to determine the appropriate volume includable within Priority 2 as storage injection requirements. This is necessary since storage serves as a source of consumption during injection, and as a source of supply with respect to volumes withdrawn. Injections should be computed on a net basis, that is, withdrawals should be subtracted out, to avoid confusing the two separate functions, and also to prevent computation of unrealistically large injection volumes which we find would be inconsistent with the purpose of providing a high priority for these uses.

The record shows that substantial evidence was introduced regarding the treatment of withdrawals from storage in computing curtailment which related both to the interim plan and the permanent plan. As we indicated in Opinion No. 634, with respect to the establishment of the interim plan, the storage withdrawal adjustment proposed by Staff added additional complications and was therefore eliminated. In this respect, there was criticism of the Staff formula because of indications that certain customers of El Paso with storage facilities (1) would not sustain any curtailment, (2) could receive deliveries in excess of their contract demand, and (3) could totally indemnify themselves from curtailment by expanding storage withdrawal capabilities. As we found this criticism to be unresolvable by reference to the record made in the interim proceeding, we chose to eliminate that provision. Further, inasmuch as the interim plan was to be effective only for the winter period 1972-73, and inasmuch as the summer storage injec-

tion season had passed at the time of the issuance of the interim plan in October 1972, we anticipated that the storage injection issue could be timely addressed in the proceedings on the permanent plan.

In our subsequent examination of this issue in the permanent plan, we have found that the record contains widely divergent views. The Presiding Law Judge concluded that injections and withdrawals should be ignored. Certain parties with large storage facilities argue that withdrawals should not be used in any manner which would result in additional curtailment. Others allege that withdrawals are used as part of winter period supplies, and cannot be physically segregated from natural gas supplied by other means, therefore making the contention that winter storage withdrawals should be used to determine the proper share of El Paso's deliveries to its customer's markets. We agree with the view that storage withdrawals cannot be physically separated from other gas supplies and therefore contribute proportionately to all sales made from a system at the time that it is receiving withdrawal volumes.

It then follows that net storage withdrawals contribute on a proportionate basis to all *end-uses* being served contemporaneously by a given system. We thus conclude that net storage withdrawals should be treated as a customer's independent source of supply in computing El Paso's share of such customer's requirements for a particular period. We further find that the record in this proceeding does not support the contention that treatment of storage withdrawals as a source of supply will discourage future development of gas storage facilities.

Priority 3 shall be the catch-all category for unspecified industrial requirements and as such represents a large

group of generally smaller volume industrial uses of all types. On a unit of gas displacement basis, conversion to other fuels for these uses is more costly than in the case of larger volume uses. Gradation of the uses in this priority category by volume is not practicable in view of the number and variety of industrial applications represented.

Our assignment of boiler fuel usage to the lowest priority categories in the interim plan was remanded by the United States Court of Appeals for the District of Columbia Circuit in its January 21, 1974 decision in *American Smelting and Refining Company, et al.* v. *F.P.C.*, —— F.2d ——, for lack of specific supportive findings and reasoning. It is therefore necessary to state here that our decision in Opinion Nos. 634 and 634-A to subordinate boiler fuel to the lowest curtailment priorities was based on the same findings and reasoning which, as set forth hereinafter, compel a like subordination of boiler fuel in the permanent plan.

For purposes of both the interim and permanent plans, the evidence indicated that alternate fuels could be more easily substituted for natural gas in boiler fuel applications than in other applications. Secondly, the evidence demonstrated that the increase in air pollution resulting from the use of alternate fuels could be more efficiently

and economically controlled through the deployment of pollution abatement equipment by boiler fuel users because of the large size of individual installations. Third, by curtailing large volume boiler fuel users ahead of other industrial users the evidence showed that gas displacement could be maximized with a minimum of economic disruption and dislocation.

In establishing priorities as between boiler fuel users, we find, consistent with the above, that largest users should

be curtailed first. The volumetric cut-off points specified in Priorities 4 and 5 represent a modification of a four-category ranking of boilers based on size suggested by Johns-Mansville witness Marqus (Tr. 8298-8299). However, in the interest of orderly administration of both plans, we found it unnecessary to assign additional categories for boiler fuel use below 1500 Mcf per day or above 15,000 Mcf per day. We recognize that any number of gradations related to size may have been possible, however, in our judgment, the cut-off points established in Priorities 4 and 5 will result in the very largest boilers being curtailed first, with, correspondingly, the maximum initial displacement of natural gas.

The interim curtailment plan contained langauge in priorities 4 and 5 which defined requirements for boiler fuel use, "where existing alternate fuel capability is present." We stated in Opinion No. 634, "In so doing we are not requiring the installation of dual fuel capacity during the interim period. We do recognize that over the long term, the interim plan we have adopted may operate as a disincentive to the installation of alternate fuel capacities." (Mimeo page 6)

We find that circumstances regarding conversion to alternate fuels under which the interim plan was devised are no longer applicable.

Our intent as expressed in the interim plan to confine curtailment to situations where alternate fuel capability already existed is not viable long-term policy in light of El Paso's shortfall and the current nationwide natural gas shortage. We find that the public interest requires that every effort be made to convert equipment so that alternate fuels may be used where feasible.

We, therefore, provide that priorities 4 and 5 contain the terms, "where alternate fuel capabilities can meet such requirements."

Administration of Plan

The initial decision did not provide for excess gas takes. We find that the public interest requires unauthorized overrun penalties to insure compliance with the curtailment priorities established herein. For purposes of determining penalties an unauthorized overrun shall be those volumes taken by a customer which exceed the volumes available to it from El Paso by operation of this curtailment plan.

However, excess volumes which are taken to maintain the integrity of a customer's requirements in Priority 1 and Priority 2 shall not be deemed unauthorized overrun volumes for puposes of assessing penalties. In order to qualify for this exemption from penalty, a customer must be able to demonstrate that with the exception of deliveries made in satisfaction of Priority 1 and Priority 2 requirement, no deliveries were made in any other category during the period in which the excess volumes were taken. The exemption from penalty for Priority 1 and 2 uses is not

to be construed as providing opportunity for El Paso's customers to abuse the exemption by permitting growth in these Priorities which would have the effect of increasing deliveries to those customers beyond the monthly base volumes established by this curtailment plan.

The record demonstrates that the levels of overrun penalties proposed by El Paso in the proceedings * are appro-

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* Original Sheet No. 67-E, FPC Gas Tariff, Original Vol. No. 1, Section 20.4
(a) For that part of the unauthorized overrun volume up to 3% of Buyer's

priate in light of the supply situation and the price of alternate fuels reflected therein. In the event that these overrun charge levels are found to be too low in the future, El Paso has adequate remedies under Section 4 of the Natural Gas Act. We shall require El Paso to file tariff sheets consistent with our findings hereinabove on penalties.

As indicated in Opinion No. 634-A, we prevented El Paso from implementing penalties during the interim program. We hesitated to permit El Paso to do so on the basis of the uncertainties surrounding the proposal regarding El Paso's actual needs for instituting penalties. The Commission felt then as it does now, that it has the authority to order a

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entitlement for such day, an amount equal to that due under the applicable rate schedule.

(b) For that part of the unauthorized overrun volume which is in excess of 4% of Buyer's entitlement for such day, up to 5% of Buyer's entitlement for such day, an amount of $2.50 per Mcf.

(c) For that part of the unauthorized overrun volume which is in excess of 5% of Buyer's entitlement for such day, an amount of $5.00 per Mcf.

jurisdictional pipeline to install facilities when needed to physically limit deliveries to customers who violate curtailment orders.[7]

However, at the time the question was presented on the interim plan, neither El Paso nor its customers had any experience in natural gas curtailment. In fact, the E-O-C customers had no experience whatever in limiting their takes from El Paso. The impact of the penalty provision could not, in our judgment, be assessed at that time.

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[7] See *Order Authorizing and Directing Interim Enforcement of Curtailment Program Pending Final Determination of Issues*, issued July 2, 1971, in *United Gas Pipe Line Company*, Docket Nos. RP71-29, and RP71-120.

The initial decision provided for customers to furnish El Paso with end-use data every 30 days (p.30). We agree with those parties who request an extension to 60 days in which they are required to furnish such data to El Paso.

The initial decision does not provide an adjustment on behalf of the partial requirements customers which would offset reduced deliveries to such customers from their other supply sources, although it has been urged on exceptions that the Administrative Law Judge erred in failing to provide such an adjustment. In Opinion 647, *United Gas Pipe Line Company*, Docket Nos. RP71-29, RP71-120, —— FPC ——, issued January 12, 1973, we said:

> "In approving this curtailment plan for United as it affects partial requirements customers, we shall allocate the impact of curtailment equally, insofar as may be possible, upon full and partial requirements customers treating both in the same manner." (Slip op. at 14).

We did indicate in that opinion, however, that modification of our treatment of partial requirements customers might be necessary to protect small volume residential service in the event of extraordinarily severe shortages requiring curtailment in the highest priority categories. (Opinion No. 647, Slip op. at 14). In reviewing the record in the instant proceeding, we find no indication that the reduced supplies available to the California partial requirements customers from sources other than El Paso, in combination with a curtailment of entitlements from El Paso prorated equally throughout the Southern Division system, will result in a shortage of such severity as to warrant special treatment for the partial requirements customers.

The record shows that deliveries to California by Transwestern Pipeline Company and Pacific Gas Transmission Company, its other interstate pipeline suppliers, were not curtailed at the time the record was compiled in this proceeding[8] (Ex. 53; Ex. 105). The evidence also indicates that California source gas supplies equaled approximately 8% of the total requirements of the Southern California companies in 1971, with the remaining 92% being supplied by interstate pipelines including El Paso (Ex. 105).

The witness for the Pacific Lighting Utilities serving Southern California testified that the level of service to firm consumers, including industrials, has been 100% for all years 1967 through 1972, but that deliveries to interruptible consumers have been declining since 1970. He further stated that there has been a substantial decline in the level of service for interruptible consumers which will continue even with delivery of the full El Paso contract quantity (Tr. 7243).

Since interstate deliveries from all sources have not been curtailed during these years, this decline in service

[8] Since then Transwestern's deliveries have been curtailed slightly, but PGT has been able to maintain its full deliveries without curtailment.

can be attributed to two factors only. One, that the California source supplies are declining, which is a fact of record, and (2) that the gross industrial market for natural gas in Southern California has been growing, which is also a fact of record (Ex. 105). Solutions to both of these causal factors are clearly outside the scope of the Commission's jurisdiction.

Given the current natural gas supply-demand imbalance in Southern California, the question then arises as to

whether ratable curtailment by El Paso of industrial requirements within the same end-use priority on a system-wide basis is proper, or whether Southern California should be granted preferential treatment in light of its current imbalance. We find the evidence necessary to support a preference lacking.

One significant and highly variable factor controls the ability of industrial consumers exposed to natural gas curtailment to continue their operations, to wit, their ability to use and secure alternate fuels. There is no evidence in this record that industrial consumers in California are in a worse position with respect to their ability to use or to secure alternate fuels than consumers located E-O-C. In the absence of a positive showing regarding related deficiencies in alternate fuel availability, we find that curtailment should be implemented to all customers without undue preference or discrimination.

We reject a policy, without compelling evidence to the contrary, which would effectuate greater curtailment to E-O-C consumers in order to provide increased deliveries to the California markets because of either declining local supplies or growth in new industrial demands. Therefore, in our view, the decision of the Administrative Law Judge to treat full and partial requirements customers in the same manner was correct and is consistent with both our holding in the *United* case, *supra*, and the evidence herein. We therefore affirm the initial decision which provides for *pro rata* curtailment in each end-use category in proportion to the percentage of total gas supply from El Paso. Further, we do not believe that new supplemental gas supplies should receive any special

recognition under the partial requirements formula, i.e. they should not be eliminated in determining a customer's

entitlements during curtailment. However, with respect to the latter, any customer may file for reconsideration of the partial requirements formula when and if an incremental supply becomes available. As staff properly noted. (Exceptions at 29-30), requirements should be equated to historical usage, and the total use from all sources in a given priority during the base period, including storage withdrawals, should form the coefficient to determine partial requirement customers' allocations.

The Administrative Law Judge (Initial Decision at 30-31) established a monthly base period to which periodic revisions would be made so as to encourage sales to higher priorities, and used historical deliveries for the 12 months ending June 30, 1973. This finding is essentially a policy decision which is unsupported by the record. In our view, monthly base volumes should closely approximate historical usage, and thus should be based upon the 12 months ending October 31, 1972 (the period immediately preceding the interim emergency curtailment plan in Opinion No. 634).[9] We do, however, stand ready to consider revision to these base volumes at a later date and in a future proceeding upon a determination by us that such revision would be in the public interest.

Although we disagree with the "moving base period" approach adopted by the Presiding Law Judge, we do concur with his finding that annual volumetric limitations should be based on historical use rather than contract limitations. In this respect, the Presiding Law Judge observed, and we agree, that:

> On this record, the calculation of deliveries to users in a priority that is to suffer partial curtailment should be based on historical use rather than on contract limi-

[9] Compare Opinion No. 647 at para. 26.

> tations. As to California, one basis is substantially the same as the other because takes have been substantially at maximum contract
>
> levels. The E-O-C customers, meaning both the distributors and direct-sale customers, have had their requirements served 100%, but the contracts have not regularly been changed as the requirements changed. To base curtailment on contract limitations would therefore produce unrealistic and inconsistent results. To base curtailments on actual use makes unnecessary many petitions for extraordinary relief which would otherwise be filed.

This view of the record formed the basis of our decision in Opinion No. 634-A to impose annual limitations, based on actual takes, on the entitlements of the full requirements customers while basing the entitlements of partial requirements customers on contract entitlements. However, as we failed to set forth in detail our reasoning therefor, it appeared to the reviewing court that our action may have been discriminatory.[10] However, as noted by the Presiding Law Judge, *supra*, the treatment of these two groups with respect to derivation of base volumes is identical, since the contract entitlements for the partial requirements customers coincided with their historical takes.

El Paso should continue to grant emergency relief by special exemption from curtailment in order to protect electric reliability and to respond to emergency situations (including environmental emergencies) during periods of curtailment where supplemental deliveries are required to

[10] See *American Smelting and Refining Company, et al.* v. *F.P.C.*, —— F.2d ——, D. C. Cir., January 21, 1974, (Slip. Op. at 43-45).

forestall irreparable injury to life or property. The observations of the Presiding Judge at page 33 of his decision regarding the propriety of this delegation are herein reversed."[11]

[11] *Cf.* Order No. 467-A, Amendment to Statement of Policy issued January 15, 1973, in Docket No. R-469.

Environmental Issues

In our order issued August 22, 1972, we denied a motion by Air Pollution Control District of the County of Los Angeles requesting termination of the instant proceeding and preparation and circulation by Commission staff of a detailed environmental impact statement.[12] In denying the motion, however, we nevertheless authorized the presentation of environmental evidence by any party so desiring and required that the process of analysis of environmental issues be embodied in the initial decision. Evidence was received on existing ambient air quality, federal, state and local air pollution regulations, meterological conditions and possible economic consequences of gas reduction in each of the areas on El Paso's system that would be affected by curtailment.

In his review of the environmental evidence, the Presiding Judge concurred with staff's contention that on the basis of the factual record herein "any attempt to quantify the environmental impact on the El Paso service area would be abortive."[13] It is noted, however, that the concurrence of the Presiding Judge was given with no small

[12] Order Denying Motion to Terminate Proceeding and to Require Staff to Prepare and Circulate Environmental Impact Statement, Docket No. RP72-6, August 22, 1972, 48 FPC 371.

[13] Initial Decision, Docket No. RP72-6, June 5, 1973 (Slip op. at 8).

measure of reluctance, for it is apparent from the initial decision that he does not share the Commission's view of the relationship

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of the National Environmental Policy Act (NEPA)[14] to curtailment proceedings. The Presiding Judge indicates that in his view a more complete record could have been developed with respect to environmental issues had we granted the motion of the Los Angeles County Air Pollution Control District and had we not reversed his order of January 27, 1972, directing staff to present an environmental impact case. He makes reference to studies conducted by certain FPC personnel, suggesting that similar studies might have been "of interest" in the instant proceeding.

However, irrespective of the degree to which the record might have been illumined by a staff presentation on the issue of environmental impact, the other parties herein, representing a broad range of interests and viewpoints, were afforded the opportunity to present environmental impact evidence. The environmental record resulting from their efforts, as begrudgingly acknowledged by the Presiding Judge, "gives no reason to suppose that environmental considerations in the area served by El Paso gas, viewed from an overall standpoint, can be so quantified as to produce usable results."

The Presiding Judge therefore accepted staff's conclusions as to environment in every particular, as does this Commission. He expresses the view, however, that the record did not permit him to rule otherwise in light of the absence of any evidence from an "expert capable of view-

[14] National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

ing the entire El Paso situation as a witness devoted to the broadest public interest." We cannot accept this conclusion for two reasons. First, the Commission, in terms of both expertise and devotion to the public interest, is qualified to provide the perspective which the Presiding Judge feels is lacking in this record.

Second, the Commission's position on the environmental impact issue was set out in detail in our order of August 22, 1972, and is a part of the evidentiary record herein.[15]

The Presiding Judge also implies that a full record may not have been developed herein as a result of the absence of an environmental statement by the staff. As previously stated, our Order of August 22, 1972, in this docket, sets forth the reasons which, in our judgment, preclude the presentation of a staff environmental impact statement in curtailment cases. We there determined:

> In proceedings involving the justness and reasonableness of proposed curtailment plan, the pipeline company cannot supply an analysis of the potential impact its plan will have on the quality of the human environment. Nor can this Commission.[16]

Our determination was reached through the exercise of "the knowledge and experience of this Commission gained through years of intimate association with the transmission and distribution functions of the gas industry."[17] The expertise so gained, when brought to bear on the question of the environmental impact of curtailment, required the conclusion that:

[15] *Cf.* Order No. 415-C, issued December 18, 1972, in Docket No. R-398.

[16] 48 FPC at 373.

[17] *Ibid.*

> The environmental impact of the implementation of a curtailment plan depends upon such variables as the degree of curtailment, the length of curtailment, atmospheric conditions during the time of curtailment, the locality where curtailment is implemented, and the end uses of the gas flowing through the pipeline system. Each of these variables can change without any dependence one upon the other, none can be known and measured in advance, and the environmental effects of all possible combinations of the variables would be mathematically impossible to compute, much less identify and measure.[18]

A review of the record in this proceeding provides us with no basis for reaching a different conclusion. Nevertheless, the Presiding Judge also invited the attention of the Commission to language in the recent court ruling in *Alabama Gas Corp.* v. *F.P.C.*, 476 F. 2d 142, No. 72-1475, 5th Cir. February 7, 1973, as support for the belief of the Presiding Judge that the preparation of a staff environmental impact statement in accordance with NEPA's Section 102(2)(C) procedural requirements was obligatory in this proceeding.

As our order of August 22, 1972, thoroughly addressed the issue of the inapplicability of Section 102(2)(C) procedures in curtailment cases, we shall herein incorporate by reference and *in toto* the views expressed in that order.[19]

The language to which the Presiding Judge refers in the *Alabama Gas Corporation* decision is as follows:

[18] *Ibid.*

[19] *Cf. Arizona Public Service Co.* v. *F.P.C.*, 483 F.2d 1275, 1282, (D.C. Cir. 1973).

The mandate of the NEPA on federal agencies is that they comply with the procedural duties

imposed by the Act to the fullest extent possible. See *Calvert Cliffs Co-ord Com.* v. *United States Atomic Energy Com'n.*, D.C. Cir., 1971, 449 F.2d 1109, 1114-15. As there noted, the legislative history of the NEPA interprets 'to the fullest extent possible' to mean compliance unless compliance would give rise to a violation of statutory obligations.

We stated in the August 22, 1972 order that our review of court decisions did not lead us to the conclusion that the courts expect agencies to exalt form over substance in applying the mandates of NEPA.[20] We likewise do not believe that the legislative branch intended to require compliance in cases where, as here, the only result of compliance would be the preparation of an impact statement devoid of meaningful content.

We do not arrive at this judgment, however, in an attempt to shirk the responsibilities imposed on this Commission by NEPA. See *Scientist's Institute for Public Information, Inc.* v. *AEC*, 481 F.2d 1079, (D.C. Cir., 1973). It derives from our knowledge that the degree of speculation necessitated by such a prediction of future impact would, for the reasons expressed in our order of August 22, 1972, far exceed the standard of "reasonable forecasting and speculation" found in the *Scientist's Institute for Public Information* decision, *supra*, to be implicit in NEPA. In the *Scientist's Institute for Public Information* case, the court cited the "rule of reason" to be followed in determining whether an agency action has met NEPA requirements:

[20] 48 FPC at 376.

'The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible * * *.' (Footnotes omitted.) [21]

The Commission has determined in its order of August 22, 1972, that compliance with NEPA Section 102(2)(C) procedural requirements in curtailment cases is "not meaningfully possible", a determination further corroborated by the evidence in this proceeding.

Initial Decision on Application of City of Willcox and Arizona Electric Cooperative for Extraordinary Relief

The City of Willcox, Arizona and Arizona Electric Cooperative (AEPCO) contend that two issues are raised by their joint amended motion for extraordinary relief:

(1) Whether AEPCO's entire industrial load should be reclassified to a higher priority than provided under the interim curtailment plan; or, in the alternative,

(2) Whether AEPCO should be exempted from curtailment during the interim period.

The Presiding Judge correctly ruled that the issue of reclassification is directed to the merits of the curtailment plan adopted in Opinions No. 634 and 634-A, and therefore goes beyond the scope of the proceeding on the application for extraordinary relief authorized by our order issued in this docket on January 11, 1973. The hearing was ordered

[21] 481 F.2d 1079, 1092.

for the limited purpose of determining the capability of AEPCO to operate reliably and safely on fuel oil for sustained periods.

With respect to this limited issue, we find that the applicants failed to sustain the heavy burden of proving, on the basis of all factors, that an exception to the curtailment program is in the public interest.[22] The record indicates that AEPCO has been able to operate on fuel oil for extended periods. The record also supports the conclusion of the Presiding Judge that the risk of a boiler explosion occasioned by the use of fuel oil has been overstated. The attempt by the applicants to demonstrate the imminence of the dangers attending the use of fuel oil under the AEPCO boiler is not aided by the admitted disinclination of the AEPCO management to install flame safety equipment. As stated by the Presiding Judge, "one can hardly believe that it [AEPCO] is deliberately risking its plant and that it now comes in asking to be protected from its own foolhardiness."[23]

The initial decision of the Presiding Judge issued March 19, 1973, denying the joint amended motion for extraordinary relief, is therefore affirmed in full.

Initial Decision on Application of City of Mesa for Extraordinary Relief

The City of Mesa, Arizona, has asked for extraordinary relief from the operation of the interim curtailment plan for El Paso as prescribed in Commission Opinions 634 and 634-A.

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[22] Order issued January 9, 1973, *United Gas Pipe Line Company*, Docket Nos. RP71-29, RP71-120 (mimeo. at 4).

[23] Initial Decision on Application for Extraordinary Relief, Docket No. RP72-6, issued March 19, 1973 (mimeo. at 4).

Mesa's concern arises from the excess of its actual peak load over its contract quantity, because of the Commis-

sion's ruling in Opinion No. 634-A that the lesser of these two must limit the measurement of deliveries during times of curtailment.

In the initial decision on this issue, rendered June 27, 1973, the Presiding Judge denied Mesa's application as unnecessary on the grounds that Mesa's Priorities 1 and 2 customers are adequately protectd by the provisions of El Paso's tariff which requires satisfaction of Priorities 1 and 2 requirements notwithstanding contract limitations. He further found that Mesa's Priority 3 customers cannot be curtailed, pursuant to Commission direction, until customers in subordinate priorities have been curtailed 100 percent. The Presiding Judge therefore stated:

> The first two priorities are protected as Mesa wishes, and the third to the same extent as is the case with any customer. Equity requires no more. (Initi~l decision, June 27, 1973, slip op. at 4.)

We find no error in the ruling of the Presiding Judge on this issue. We note further that insofar as the permanent plan adopted here provides for calculation of curtailment requirements on the basis of historical use rather than on the basis of contract limitations, such petitions for extraordinary relief as here filed by Mesa should prove unnecessary under the permanent plan.

Decision of Administrative Law Judge on Grouping of Delivery Points

In Opinion No. 634-A, issued December 15, 1972, we ordered El Paso to eliminate from its interim curtailment plan the provision for grouping of individual delivery points. We said with respect thereto that such grouping

". . . could well result in increased industrial gas usage by those customers having a number of delivery points. Certainly it could result in discrimination against those customers, including California, who have only one delivery point." (Slip op, at 4).

In our order of February 7, 1973,[24] in response to Southern Union's application for rehearing, or in the alternative, petition for special relief, we reiterated our view that grouping should be eliminated from the interim plan but invited the presentation of evidence as to the propriety of grouping in the permanent plan.[25] Subsequently, Southern Union Gas Company (Southern Union), Arizona Public Service Company. (APS) and Southwest Gas Corporation (Southwest Gas) filed an application for a limited reopening of the record on the permanent curtailment to present evidence on the grouping issue, culminating in a hearing on June 14, 1973, and the issuance of an initial decision on September 19, 1973, by Administrative Law Judge Fribourg wherein the grouping of delivery points was approved for El Paso's permanent curtailment plan.

The United States Court of Appeals for the District of Columbia Circuit, on January 21, 1974, issued a decision on the interim plan for El Paso in *American Smelting and Refining, et al.* v. *F.P.C.*, —— F. 2d ——. The court ruled, *inter alia.*

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[24] Order on Protests, Motions for Clarification, Applications for Rehearing of Interim Curtailment Plan.

[25] *Id.*, Slip op. at 6.

that our elimination of the grouping of delivery points from the interim plan was not sustained by substantial evidence that such grouping would be discriminatory. The

court therefore reversed our findings with respect to grouping in Opinion 634-A, and remanded the issue to us for further fact finding.

Our concern that the practice of grouping of delivery points may be discriminatory with respect to single delivery point customers remains undiminished, notwithstanding the initial decision of September 19, 1973, and the action of the court in *American Smelting and Refining, supra.* Although the Presiding Judge found in the September 19, 1973 initial decision in the reopened proceeding that grouping should be permitted on the El Paso system, we are unable to sustain his finding in view of the inconclusive nature of the evidence presented.

The record does not clearly reflect the volumes which would be available to multiple delivery point customers by the use of grouping as compared to the volumes available to such customers if grouping is not permitted. In our view, the question of possible discrimination cannot be adequately addressed absent this determination of the actual quantity of gas involved. The Presiding Judge endeavored to elicit this information in the course of the hearing. However, in apparent reliance on the following statement by counsel for Southern Union, little effort was thereafter devoted by the Presiding Judge to the clarification of the record on this point:

> "Mr. Haggerty: Your Honor, as we began to prepare our evidence in this case we attempted to address that problem. What we ran up against was the problem that you have to develop such an elaborate set of assumptions in order to reach any finite volume, that we could not even begin to give a definite number that we are talking about." (Tr. 8814)

We are reluctant to conclude that the distributors here involved are incapable, in terms of either operating expertise or technical resources, of determining the total volume of gas upon which this grouping controversy centers. Further, we find the record to be deficient with respect to the actual manner in which volumes would be shifted among customers if grouping is permitted. We cannot say that no discrimination will occur as between the market areas served in the absence of information regarding how and when volumes are shifted.

Additionally, it is asserted that grouping will aid the resolution of supplemental supply problems, inasmuch as a single central peak-shaving facility could be utilized which would preclude the need for a number of small peak-shaving facilities at individual service areas. However, the evidence does not reveal those specific service areas which might require peak-shaving facilities if grouping were prohibited, nor does the evidence show that the manner in which a central facility would operate would necessarily benefit customers in remote service areas.

In brief, we find the evidence on the reopened record does not permit an informed decision as to whether grouping should be permitted in El Paso's permanent curtailment plan. We therefore remand that issue to the Presiding Judge for additional evidence concerning those matters which we raise herein.

Insofar as the state of the record at this time does not permit us to find on the basis of substantial evidence that the grouping of delivery points on the El Paso system is discriminatory, we hereby set aside that portion of Opinion No. 634-A which prohibited the use of grouping for the interim curtailment plan. Grouping shall thus be permitted

on the El Paso system commencing as of the date of this opinion until such time as the evidence developed in the remanded proceeding may otherwise require.

The commission further finds:

(1) El Paso's interim curtailment plan in Docket No. RP72-6, as prescribed in Opinion Nos. 634 and 634-A, and as extended by our order of October 18, 1973, except as modified herein by the elimination from Opinion No. 634-A of the prohibition of grouping of delivery points, is just and reasonable for the period ending as of the effective date of this opinion.

(2) El Paso should revise its permanent plan to provide for the priorities of service in times of curtailment as set forth in this opinion and order and such a permanent plan is just and reasonable.

(3) The Initial Decisions of March 19, 1973, June 5, 1973, and June 27, 1973, are affirmed, to the extent consistent with this opinion and order, and all exceptions, not herein granted, should be denied.

(4) The Initial Decision of September 19, 1973, is reversed and remanded to the Presiding Administrative Law Judge to adduce additional evidence on those matters raised herein pertaining to the propriety of the grouping of delivery points in the permanent curtailment plan.

(5) In view of the decision herein, all applications for rehearing and reconsideration of the Commission's order of October 18, 1973 extending the interin curtailment plan for El Paso, as granted by our order of December 3, 1973, are rendered moot.

(6) The joint motion by the City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc., filed March

14, 1974, requesting modification of the interim curtailment plan is denied.

(7) The revised tariff sheets to be filed by El Paso should reflect the definitions contained in Order No. 493-A, issued October 29, 1973.

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The Commission orders:

(A) El Paso shall contine such curtailments as are necessary in accordance with the interim curtailment plan prescribed in Opinion Nos. 634 and 634-A and modified in finding paragraph (1) hereof, pending further Commission action on the tariff sheets to be filed in (B).

(B) El Paso shll file revised tariff sheets, within 30 days after this opinion and order, consistent with the terms and conditions prescribed herein.

(C) The Administrative Law Judge's Initial Decision of March 19, 1973, is adopted as part of this opinion, and exceptions, not granted, are denied.

(D) The Administrative Law Judge's Initial Decision of June 5, 1973, to the extent not inconsistent herewith is adopted as part of this opinion, and exceptions, not granted, are denied.

(E) The Administrative Law Judge's Initial Decision of June 27, 1973, is adopted as part of this opinion, and exceptions are denied.

(F) The Administrative Law Judge's Initial Decision of September 19, 1973, is reversed and remanded to the Presiding Administrative Law Judge to adduce additional evidence on those matters raised herein pertaining to the propriety of the grouping of delivery points in the permanent curtailment plan.

(G) All applications for rehearing and reconsideration of the Commission's order of October 18, 1973, extending the interim curtailment plan for El Paso, as granted by our order of December 3, are rendered moot by our decision herein.

(H) The joint motion by the City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc., filed March 14, 1974, requesting modification of the interim curtailment plan is denied.

(I) This opinion and order shall become effective within 60 days after its issuance, or, in the event applications for rehearing are filed, upon the date of a final order on rehearing in this proceeding, whichever is the later.

By the Commission.

Commissioner Moody, dissenting, filed a separate statement appended hereto.

(SEAL)

Commissioner Smith, dissenting in part, filed a separate statement appended hereto.

KENNETH F. PLUMB,
Secretary

El Paso Natural Gas Company) Docket No. RP72-6

(Issued June 14, 1974)

MOODY, Commissioner, *dissenting:*

I.

Noncompliance with Section 102(2)(c) of NEPA[1] is premised upon the view that "preparation of an impact statement [would be] devoid of meaningful content." (Order, p. 21.) This is essentially the same position taken by the Commission in its August 22, 1972, order in this docket,[2] wherein we declined to order Staff preparation of an impact statement.

No matter how logical this position,[3] it has been rejected by the Courts—directly rejected in this case,[4]

[1] 42 USC 4321, *et seq.*

[2] 48 FPC at 376.

[3] At the time of issuance of the August 22, 1972, order, I shared the belief of my colleagues that application of a rule of reason permitted noncompliance with Section 102(2)(c) in curtailment cases; I believed then, and still believe, that any impact statement in a curtailment case will be filled with speculation and conjecture because of the multiple unpredictable variables involved.

[4] The August 22 order was before the Court in connection with the appeal of our order prescribing an interim plan for El Paso. See *American Smelting & Refining Co.* v. *F.P.C.*, No. 72-2204, CADC, slip opinion issued January 21, 1974. While the Court excused noncompliance with NEPA in formulating an interim plan, Part I of the opinion (pp. 46-48) makes clear that the Court will require compliance before a permanent plan is prescribed, unless statutory impossibility is demonstrated.

and inferentially rejected by the Fifth Circuit.[5] I take it that only where Section 102(2)(c) compliance gives rise

[5] *Atlanta Gas Light Co.* v. *F.P.C.*, 476 F.2d 142 (CA5, 1973), at 150.

to a violation of statutory duty is compliance excused;[6] such a situation is not here present. We should, therefore, delay no longer the implementation of NEPA procedures, even though this will require a continuation of El Paso's interim plan[7] until the environmental impact of that plan, and alternates thereto, are studied.

II.

As indicated, I do not believe we can validly prescribe a permanent curtailment plan in the absence of Section 102 (2)(c) environmental impact studies. The majority's rejection of this view, and their consequent adjudication of curtailment priorities and implementation, necessitates an expression of my disagreement concerning one aspect of the disposition of the case on its merits. I dissent to the determination that the distinction between firm and interruptible sales in the El Paso system should be ignored.

III.

When an agency such as ours is called upon to implement rationing by administrative fiat, we are confronted at the outset with the inescapable fact that there is not enough of this precious fuel to go around, and someone must be told that he must shoulder the burden of first interruption.

[6] *Calvert Cliffs Coordinating Committee* v. *A.E.C.*, 449 F.2d 1109 (CADC, 1971); *Atlanta Gas Light Co.* v. *F.P.C.*, *supra*; *American Smelting & Refining Co.* v. *F.P.C.*, *supra*; and see *Scientists' Institute for Public Information, Inc.* v. *A.E.C., et al.*, 481 F.2d 1079 (CADC, 1973) holding that uncertainties in an agency's evaluation of environmental impact does not justify noncompliance.

[7] The interim plan should be evaluated, and modified where necessary, in accord with the Court's mandate in *American Smelting*, *supra*, and particularly the orders entered by the Court of Civil Appeals on May 22, 1974 and June 10, 1974. This should be the function of the present opinion, rather than attempting to prescribe a permanent plan at this time.

I consider it appropriate for us to approach this most difficult problem by considering the impact of our curtailment orders; if the result of our orders is to impose curtailment on some who have no means of using an alternate fuel, at a time when there are other customers on the pipeline system who can utilize alternate fuels, a decision to authorize the flow of gas to the fuel-sufficient customer is very difficult to defend.

I consider it appropriate for us to consider also the historic facts concerning gas usage on a given pipeline system; if one class of customers has historically paid a higher price in return for the apparent guarantee of preference in gas service, while other customers have paid a lower price in recognition of the pipeline's acknowledged right to interrupt that service, the *quid* has been paid and it is time for us to put the *pro quo* into the transaction.

In the evolvement of our curtailment policies, considerations such as these led us to say in Opinion 643, *Arkansas Louisiana Gas Company*, Docket No. RP71-122:

> ". . . [T]hose cusotmers, be they direct sales or indirect sales, who require gas for human needs service or non-substitutable industrial service do not contract on an interruptible basis. Interruptible service, at the lower rates charged for such service, envisions interruption. And accordingly, interruptible customers can most reasonably be expected to have alternate fuel facilities already operational. We conclude, therefore, that curtailment should first fall on those who have not historically borne the full-fixed costs of providing gas service, particularly since these customers are best prepared to accept interruptions in service and clearly do not require uninterrupted service for protection of life or property.' (49 FPC 53 at 66; Footnote omitted.)

Subsequent to the issuance of Opinion 643, we recognized the wisdom of granting firm gas service a preference over interruptible gas service in every curtailment proceeding that came before us. We acknowledged this to be our policy view when we issued Order 467-B in Docket No. R-469.

After reviewing this record, I am persuaded that the same policy considerations apply to the El Paso Southern Division curtailment, and I think we should accord a preference to firm service over interruptible service for this pipeline, not because we previously determined that such should be done, but because this record demands such treatment if a just and reasonable and nondiscriminatory program of curtailment is to be carried out.

IV.

This record reflects that interruptible service rendered in California has been rendered, historically, at a rate lower than that charged firm industrial customers. Using the year ended December 31, 1971, for comparison, it appears that interruptible loads were paying 32¢ to 34¢/Mcf while the B-1 rate customers were being charged from 35.66¢/Mcf to 37.97¢/Mcf. The B-1 customers are all located east of California, so it is obvious that the California interruptible market received its gas at a rate substantially lower than the quoted figures would indicate once the additional cost of transportation is taken into account.

The record further indicates that California interruptible customers whose requirements are in excess of 200 Mcf per day are required by state law to maintain alternate fuel facilities. I can find nothing in this record indicating that these interruptible customers cannot utilize alternate fuels.

Given these facts, I can find no acceptable reason for eliminating the distinction between firm and interruptible service.

V.

The majority concludes that the distinction between firm and interruptible service should not be recognized on the El Paso Southern Division because (1) recognition of the distinction would result in curtailment falling heavily on the California industrial market while gas used for the same purposes east of California would have a lighter curtailment burden (majority opinion, pp. 5 and 6) and (2) California interruptible customers became such because of state law and

not because of a conscious decision to choose interruptible service (majority opinion, pp. 6-7).

I find neither reason persuasive, but before addressing the substance of the matter, it is necessary to worry for a moment about the language chosen by the majority in discussing this issue. The majority says:

> "Adoption of the Order No. 467-B priorities for the El Paso Southern Division System would result in virtually all the E-O-C industrial customers with requirements in excess of 200 Mcf daily escaping curtailment until such time as California customers with similar requirements had been totally curtailed. By virtue of his firm contract, the E-O-C industrial customer would be entitled to a higher priority curtailment category despite the fact that his use for gas was the same as, or even inferior to, that of his California counterpart. For example, while California industrial consumers were being curtailed, the full contract requirements of the electric generating facilities of Arizona Public Service Company, Tucson Gas and Electric Company, El Paso Electric Company, and the Salt River Project, all of whom purchase under firm direct sales contracts, would continue to be served." (pp. 5-6.)

This language invites grave misunderstanding. We do not, and cannot, control the volume of gas that will be delivered to the California industrial customers. These customers are served by distributors which purchase gas from El Paso and the function of our curtailment plan is only that of determining the allocation of gas which the California distributors are to receive from El Paso. How that gas is then allocated within the State of California rests with the California distributors and the California Public Service Commission.

I consider it vital that there be no misunderstanding on this score. This Commission has not undertaken to dictate the end uses to which natural gas is put at the point of ultimate consumption. We have left this decision to the state regulatory commissions. Once we determine the allocation to be made by the pipeline to the distributor (which allocation we make in terms of end-use patterns), we have had our say; any state may choose to allocate the volumes which a distributor receives from an interstate pipeline on a different pattern of end-use priorities than the ones that we apply for allocation purposes. The state commission must have this freedom, I believe, in order to be responsive to the multitude of local considerations which are beyond our knowledge and beyond our capacity to evaluate.

VI.

I turn to my reasons for disagreement with the substantive matters as stated in the majority opinion. The first, as noted above, is that the impact of curtailment on the California industrial market *vis-a-vis* the east of California industrial market should be lightened. This conclusion seems erroneous to me because the California industrial customers that raise concern with my colleagues are precisely within the category of gas users best equipped and best able to handle the initial burden of curtailment. These industrial customers do indeed have alternate fuel capacity; their alternate capacity is in place and in operation. They have access to alternate fuels.

The majority is led to depart from the firm/interruptible distinction because the regulatory policy of the State of California has been one which prohibits large industrial sales from being made on a firm basis if alternate fuels can be used. But this policy does not negate the incontestable fact that substantially all of the California interruptible service satisfies the very considerations that the Commission relied upon in concluding that interruptible requirements should be curtailed first. The fact that state policy may have had a hand in creating conditions which comport with federal policy surely provides no justification for declining to carry out federal policy. Indeed the very opposite would seem to be true. It was indeed the policies of the California Commission which have permitted the California distributors to purchase gas at a 100 percent load factor and thereby minimize the average cost per Mcf to all classes of customers in California, residential, commercial and industrial.

VII.

The majority also eliminates the distinction between firm and interruptible service on the El Paso Southern Division because of its conviction that the status of the California industrial contracts as interruptible reflects state policy and does not truly reflect "the intensity of a purchaser's need for gas." (Majority order, p. 6.) I disagree. The very fact that the California industrials have operated under interruptible contracts for a long period of time is indeed a measure of the intensity of their need. If we concern ourselves only with the facts of record here, it seems inescapable that the California interruptible industrial market does have alternate fuel capacity in place and operational. The firm customers of El Paso which are located to the east of California and which never envisioned the interruption of service because they had firm contracts are not so prepared for curtailment at this time. As Nevada Power Company puts it:

> "Interruptible end users on El Paso's system, such as SoCal Edison, have bought natural gas at lower prices and have alternate fuel facilities already operational. Firm end users, such as Nevada Power, have paid higher prices for the assurance of a firm gas supply and, consequently, were not expected to install—and had not in fact installed—equivalent alternate fuel capacities." (Nevada Power Company's Brief on Exceptions, p. 7.)

I cannot, in good conscience, ignore the realities of the present in order to reconstruct what might have been if California regulatory policy had been different.

/s/ Rush Moody, Jr.
Rush Moody, Jr., Commissioner

El Paso Natural Gas Company) Docket No. RP72-6

(Issued June 14, 1974)

SMITH, Commissioner, *dissenting in part:*

An environmental impact statement to accompany a "major federal action significantly affecting the quality of the human environment"[1] must be prepared "unless there is a clear conflict of *statutory* authority." *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission,* 449 F.2d 1109, 1115 (D.C. Circ., 1971). The Federal Power Commission has a "statutory duty to the public to take effective *interim* curtailment action in the exegencies presented by gas shortages," *Atlanta Gas Light Company* v. *Federal Power Commission,* 476 F.2d 142, 150 (5th Circ., 1973). Thus, where it is impossible to prepare the NEPA statement within the time necessary to implement the interim plan and in the emergency situation, the statutory duty of the FPC and the NEPA requirements are inconsistent and the former prevails. See *American Smelting and Refining Company* v. *Federal Power Commission,* No. 72-2204 (D.C. Cir., 1974). However, where there is ample time to prepare the impact statement prior to fulfilling the statutory obligations, by the implementation of a final curtailment plan, it is not impossible to prepare the impact statement, it is only *difficult* to make the judgments necessary to formulate environmental analysis. "Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section (NEPA 102) of its fundamental importance." *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission,* supra.

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[1] NEPA § 102(2)(c), 42 U.S.C. § 4321.

The court in *American Smelting and Refining Company* v. *Federal Power Commission,* No. 72-2204 (D.C. Cir., 1974) recognized that in a situation requiring "prompt" action, the impact statement is not required, but the court also clearly indicated an expectation that an impact statement would be prepared for consideration with the final curtailment plan in this case.

The failure to prepare an environmental impact statement to accompany the final El Paso curtailment plan will almost certainly result in the implementation of the plan being substantially delayed. "(M)eaningful consideration of environmental factors (must be given) at all stages of an egency decision making." *Scientists Institute for Public Information, Inc.* v. *Atomic Energy Commission,* 481 F.2d 1079, 1091 (D.C. Circ., 1973); *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission, supra* at 1114. The reversal of the final curtailment plan because of absence of the environmental impact statement would render necessary a reconsideration of substantially all other issues relating to the curtailment plan. This would cause further unreasonable delay in the implementation of a fair, equitable, and final curtailment program. The attendant time, expense, and business uncertainty should be minimized.

Neither "expertise and devotion to the public interest" (Order, p. 18) nor "knowledge and experience . . . gained through years of intimate association with the transmission and distribution functions of the gas industry" (Order, p. 19) can substitute for compliance with a statutory requirement, particularly when a reviewing court has clearly signalled its attitude towards the matter.

I dissent to the failure of the majority to direct Staff to prepare a NEPA statement, and otherwise concur with the disposition of the case.

/s/ Don S. Smith
Don S. Smith, Commissioner

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 697-A

El Paso Natural Gas Company) Docket No. RP72-6

Opinion and Order Clarifying and Modifying Prior Opinion, Denying Motions for Stay and Reopening of the Record and Denying Rehearing Except as to Limited Issue, and Providing for Operation of Proposed Permanent Plan Pending Decision on Remanded Issue

Issued: December 19, 1974 DC-53

. . . . . .

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer, and Don S. Smith.

. . . . . .

NASSIKAS, Chairman:

A number of parties to this proceeding have made various filings requesting stay, reopening of the record, clarification, modification and rehearing of our Opinion No. 697, issued June 14, 1974, in which we prescribed a permanent curtailment plan for El Paso Natural Gas Company (El Paso). A chronological list of these filings is attached as Appendix A of this opinion. In light of the numerous issues raised by the filings with respect to Opinion No. 697, we granted rehearing for purposes of further consideration on August 5, 1974. Additionally, on July 15, 1974, El Paso tendered for filing proposed revised tariff sheets as required by Opinion No. 697 and we now have that tariff as well as the many filings before us.

Various parties take issue with our findings in Opinion No. 697 concerning the relegation of boiler fuel usage to the lowest curtailment priorities, the treatment afforded partial requirements customers, and the elimination of the distinction between firm and interruptible contracts in the assignment of curtailment priorities. As similar arguments were made to us prior to the issuance of Opinion No. 697 and thoroughly addressed therein, we find no reason to discuss them further in this opinion. However, the filings do raise other questions, particularly with respect to administration of the permanent plan, which require further clarification and, to some extent, modification of Opinion No. 697. In addition, we find it necessary to remand this proceeding for purposes of compliance with Section 102 (2)(c) of the National Environmental Policy Act of 1969.[1]

[1] Order No. 467-B, Docket No. R-469, issued March 2, 1973.

Applicability of Order No. 467-B

City of Willcox and Arizona Electric Power Company (AEPCO) contend that Order No. 467-B,[2] our general statement of policy regarding priorities of service to be followed by interstate pipelines during periods of curtailment, has been mechanically applied in this proceeding without reference to the extensive record here developed.

As noted by the Presiding Judge, counsel for the many parties to this proceeding "have worked with diligence and ability to create a record that will properly reflect the best interests of their clients." (Slip op. at 9). From this record we have developed a schedule of five priorities, based on end use, which we find to be just and reasonable for purposes of administering curtailment on the El Paso system on a long-term basis. This record also indicates, however, that the end-use concept of curtailment, found to be warranted by this record, could not be applied in a non-preferential manner by establishing priorities of service according to the firm or interruptible contractual nature of the service to be rendered. Particularly in view of the fact that the "firm-interruptible" distinction is a fundamental element of Order No. 467-B, we find unacceptable the allegation that Order No. 467-B has been mechanically applied here. Furthermore, the five priorities adopted in Opinion No. 697, with slight modification, are similar to those established in the interim plan. These priorities have been tested in the evidentiary hearing below and in actual operation.

[2] 42 U.S.C. 4321, *et seq.*

Administration of Plan

In Opinion No. 697 it was our intent to establish annual limits on the volumes which El Paso is authorized to deliver to its customers. Such annual base volumes were to be equivalent to the actual historical takes by El Paso's customers for the 12 month period ending October 31, 1972. We further envisioned that El Paso would curtail in accordance with the annual limitations established in Opinion 697 but would permit daily flexibility in curtailment to protect high priority loads which fluctuate widely east of California on a day-to-day basis. It was hoped that the enunciation of these general principles would be sufficient to enable El Paso to implement the plan.

El Paso, however, appears to interpret our views with respect to the administration of the plan as incorporating the daily delivery limitation feature of the "moving base period" approach of the Presiding Judge. It was our intention in Opinion No. 697 to reject the "moving base period" approach in its totality. However, it appears upon review of our discussion of this matter in Opinion 697 that differing conclusions could possibly be drawn as to the nature of our intentions.

We therefore find it necessary in this opinion to address the administrative aspects of the permanent plan in a more detailed fashion. In addition, we find it necessary to adjust the base year established in Opinion No. 697 to reflect recent growth in high priority loads in the E-O-C market. We also find, in view of the need for maximum flexibility on the El Paso system to protect temperature-sensitive high-priority loads, that a seasonal base volume should operate as the basis for determining customer entitlements. These modifications, as well as the relationship

of overrun penalties to the effective operation of the plan, shall be more fully explained in the discussion of administration of the plan which follows.

We found in Opinion No. 697 that the record required us to establish a base period reflecting actual historical usage rather than contractual entitlements to assure an equitable allocation of El Paso's existing supply.

Arizona Public Service Company (APS) and El Paso have alleged on rehearing that the magnitude of growth in high priority loads East of California since implementation of the interim plan would not permit E-O-C distributors to adequately protect high priority customers if the Opinion No. 697 base period is utilized. Although the extent of this alleged growth cannot be considered to be a part of this record, we recognize nonetheless that growth in the higher priorities would in fact have occurred in the normal course of load upgrading, since no express prohibition was contained in the interim plan and in view of our decision not to impose overrun penalties for the interim plan.[3] To the extent such growth has occurred, and because of the safety risks and industrial dislocations associated with curtailment of these newly attached high priority customers, we find that the only reasonable alternative is to require El Paso to adjust the Opinion No. 697 base period to reflect that growth.

We further recognize that such an adjustment could be considered discriminatory to California customers to

[3] *cf.* 5th Revised Sheet No. 63, El Paso's FPC Gas tariff, Original Volume No. 1.

the extent that an increase in base volumes to E-O-C customers may cause some diversion of deliveries away from lower priority California customers. However, we do not

believe such discrimination is undue in the circumstances. Base volumes for California customers will reflect takes at essentially maximum contract demand while some E-O-C customers who have taken at less than 100% annual load factor will be limited to base volumes reflecting historical usage and not the full contractual demand on an annual basis to which they otherwise would have been entitled in the absence of curtailment on the El Paso system. We likewise cannot ignore the fact that this adjustment is made on behalf of existing small volume human needs customers in Priority 1 who cannot sustain curtailment under any circumstances and for whom El Paso is the sole source of supply. Furthermore, we cannot fail to recognize existing requirements of customers over 50 Mcf per day and essential industrial uses for which alternate fuels are not technically feasible, and for whom El Paso is also the sole source of supply.

We shall, therefore, require El Paso to compile annual base volumes for its customers reflecting actual historical takes for the 12 month period ending October 31, 1972, adjusted to also reflect the annualized effect of attached Priority 1 and 2 loads existing as of October 31, 1974. These base volumes, as adjusted, shall not exceed 100% entitlement of daily contract quantities on a seasonal or annual basis. From this adjusted base period El Paso will then establish both a Winter Season Base Volume and a Summer Season Base Volume for each customer. The Winter Season Base Volume shall comprise the period November 1 through April 30 while the Summer Season Base Volume shall comprise the period May 1 through October 31.[4] The seasonal base volumes so described will serve as absolute limits on

[4] This conforms to the storage withdrawal and injection period for El Paso's own storage as reflected in Section 11.3A of the General Terms and Conditions of its FPC Gas Tariff Original Volume No. 1.

El Paso's authority to deliver gas to its customers until further order of the Commission.

As previously noted, El Paso has interpreted Opinion No. 697 as incorporating the daily limitation feature of the "moving base period" approach adopted by the Presiding Judge, namely the "average day" concept whereby customers would be limited to deliveries not exceeding the average daily delivery of the corresponding month in the base period. Inasmuch as we did not intend that the "average day" concept should be utilized in the daily implementation of the permanent plan, we agree with El Paso's contention that the average day concept does not provide sufficient flexibility to protect temperature-sensitive high-priority loads, particularly in view of the limited storage capacity available to El Paso to service severe temperature swings in the E-O-C market.

However, we do believe that some form of permanent daily limitation should be placed on El Paso's authority to deliver gas to its customers in order to protect the operational integrity of El Paso's system on any particular day.[5]

Therefore, the maximum daily demand obligation in a customer's contract with El Paso shall be operative with respect to determining the limitations on El Paso's daily delivery obligation to that customer. However, for E-O-C resale customers such as the City of Mesa, Arizona, whose

[5] Customers must be subject to daily limits on takes so that El Paso can plan operations within its existing capacity and supply constraints.

peak day requirements in Priorities 1 and 2 during the operation of the interim plan have exceeded the maximum

daily demand obligation set forth in their contracts with El Paso, El Paso shall establish for each such customer a peak-day entitlement based on peak day requirements of Priority 1 and 2 loads attached as of October 31, 1974.

Having established Winter and Summer Season Base Volumes, and having adjusted peak day delivery obligations where appropriate, El Paso shall then be required to construct an end-use profile for the market of each customer, as explained hereafter, to determine the allocation of El Paso's available gas supply in accordance with the priorities of the permanent curtailment plan.

El Paso shall first construct a schedule of requirements in each priority category for each customer for the 12 month period ending October 31, 1974, broken down by month and season, from data which was supplied by El Paso's customers for purposes of administration of the interim plan. The term "requirements" as used in this context shall mean the volumes for each service priority reported each day by the customer to the El Paso dispatcher, which volumes are equivalent to El Paso's share of the customer's anticipated sales in each service priority assuming no curtailment from El Paso and, in the case of partial requirements customers, assuming a reasonable estimate of other gas supply sources including storage, peak shaving, SNG, and LNG. For direct industrial customers, El Paso shall construct an end-use profile of requirements equivalent in volume to the base volumes for each such customer for the appropriate period. El Paso will adjust the requirements to reflect the reclassification from Priority 2 to the appropriate priority of deliveries made for purposes of irrigation pumping, oil and gas production, and total energy systems in order to correctly reflect the impact of the priorities and definitions adopted in Opinion No. 697. El Paso shall also adjust the requirements within Priorities 1 and 2 to reflect the annualized effect of attached Priority 1 and 2 loads existing as of October 31, 1974, on the same basis as that used to adjust base volumes described previously herein.

By comparison of the schedule of requirements to the seasonal base volumes, El Paso can then develop seasonal end-use profiles indicating the priorities which could be served if it were possible to deliver full base volumes. Requirements in excess of monthly base volumes will be eliminated from the end-use profile, with the lowest priority requirements first to be eliminated. This step is essential in order to provide sufficient deliveries to protect existing requirements of high priority loads.

The end-use profile will thus serve as the reference point for calculation of the seasonal entitlement of each customer of El Paso.

No less than one month prior to the advent of each season El Paso shall estimate its total available gas supply for the coming season. The estimated total available supply shall be superimposed upon the end-use profile to indicate the amount of gas which is estimated to be available to the customer in each priority category for the seasonable period. El Paso will then provide a copy of the estimated season entitlement, broken down by month, to each customer to provide guidance to the customer in scheduling his seasonal takes. In addition, El Paso shall file with the Commission a report of estimated seasonal entitlements will be adjusted by El Paso at the end of each season to reflect actual operating experience over the seasonal period. The seasonal entitlements as adjusted will serve as the basis for assessing the seasonal overrun penalty which will be described hereafter.

Overrun Penalties

El Paso will curtail on a daily basis. Customers who on any day take volumes in excess of the amount authorized to be taken that day by El Paso under its curtailment plan shall be assessed a penalty on such excess in accordance with the penalty levels proposed by El Paso in this proceedings.[5] However, excess volumes which are taken to maintain the integrity of a customer's requirements in Priority 1 and Priority 2 shall not be deemed unauthorized overrun volumes for purposes of assessing daily penalties. In order to qualify for this exemption from the daily penalty, a customer must be able to demonstrate that with the exception of deliveries made in satisfaction of Priority 1 and Priority 2 requirements, no deliveries were made in any other category during the day on which which the excess volumes were taken. No exemption from penalty for daily takes in excess of authorized deliveries shall obtain on days when El Paso must curtail into Priority 2 on a systemwide basis.

A similar exception provision was established in Opinion No. 697, coupled with the admonition that:

[5] Original Sheet No. 67-E, FPC Gas Tariff, Original Vol. No. 1, Sectioin 20.4
(a) For that part of the unauthorized overrun volume up to 3% of Buyer's entitlement for such day, an amount equal to that due under the applicable rate schedule.
(b) For that part of the unauthorized volume which is in excess of 3% of Buyer's entitlement for such day, up to 5% of Buyer's entitlement for such day, an amount of $2.50 per Mcf.
(c) For that part of the unauthorized overrun volume which is in excess of 5% of Buyer's entitlment for such day, an amount of $5.00 per Mcf.

> "The exemption from penalty for Priority 1 and Priority 2 uses is not to be construed as providing opportunity for El Paso's customers to abuse the exemption by permitting growth in these Priorities which would have the effect of increasing deliveries to those customers beyond the monthly base volumes established by this curtailment plan." (Opinion No. 697, slip op. at 15a, 16.)

We have determined upon reconsideration that admonitory language is not sufficient to insure that seasonal entitlements will not be exceeded as a result of future growth in Priorities 1 and 2. In conjunction with our decision herein to administer curtailment on the basis of seasonal entitlements, we also find it necessary to require El Paso to impose penalties on deliveries taken by a customer in excess of his seasonal entitlements. The purpose of this penalty is, of course, to prevent diversions of gas between customers in a discriminatory or preferential manner. El Paso shall therefore be required to provide in its revised tariff for penalties similar to the penalties for daily overruns discussed above to be applied by volumes taken by a customer in excess of his applicable seasonal entitlement. The seasonal penalty, however, should also permit the customer to credit the dollar amount of all daily overrun penalties accrued by the customer during the seasonal period against the dollar amount of the penalty incurred for the seasonal overrun.

At this point a brief summary is in order to aid in conceptualizing the mechanism which we propose for administering El Paso's permanent curtailment program. First, El Paso will establish Winter and Summer Season Base Volumes for each customer and will determine seasonal entitlements on the basis of an end-use profile reflecting requirements reported to El Paso by its customers during

the year ending October 31, 1974 as adjusted. El Paso will curtail on a daily basis with penalties assessed for daily overruns except in instances where excess volumes are taken solely for the protection of Priority 1 and Priority 2 customers. Penalties will also be assessed for overruns of seasonal entitlements.

We believe that the administrative mechanism here developed will give El Paso the daily and seasonal operating flexibility it needs to protect its high priority loads while at the same time equitably stabilizing growth on a system faced with continuing gas supply shortages.

Emergency Relief From Curtailment

El Paso has filed a response to protests of General Motors Corporation and Nevada Power Company against its proposed tariff sheets dated August 6, 1974,[7] which were tendered by El Paso in purported compliance with Opinion No. 697, Ordering paragraph (B), and which modify the interim emergency curtailment plan provisions.

In its response El Paso has provided additional clarifying language to this provision which sets forth information to be submitted and procedures to be followed by customers seeking emergency relief from El Paso through special exemption from the curtailment provisions of the tariff in order to protect electric reliability and respond to emergency situations, including environmental emergencies during periods of curtailment where supplemental deliveries are required to forestall irreparable injury to life or property.

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[7] Proposed Section 11.8, Second Revised Sheet No. 63-E and Original Sheet No. 63-F, of El Paso's FPC Gas Tariff, Original Volume No. 1, relate to Emergency Relief From Curtailment.

We have reviewed the additional guidelines proposed by El Paso and find the suggested changes constructive and useful in the administration of its Commission-delegated powers to grand unilateral relief. The proposed tariff language, as modified by El Paso, should be refiled as part of its permanent curtailment program.

Storage

We determined in Opinion No. 697 that the record indicated a relatively high priority should be accorded to natural gas used for injection into storage as the primary purpose of storage is the protection of high-priority loads. We also found that injections should be netted against withdrawals in computing the injections volumes which would qualify for Priority 2 treatment. We further found that storage withdrawals should be considered as an independent source of supply of all customers with storage capability in computing El Paso's share of the requirements of such customers.

Clarification has been requested by various parties with respect to the period to be utilized for netting withdrawals against injections. Some parties, including American Smelting and Refining (ASARCO) and Southern Union, request more guidance as to the means by which we propose to assure that only such injection gas which is in fact used in satisfaction of high priority temperature-sensitive requirements will be accorded Priority 2 treatment.

We agree with the contention by ASARCO that withdrawals and injections over the course of a year would be approximately equal, with the result that customers with storage would be able to claim minimal net injections, if any, that would qualify for Priority 2 treatment on an annual basis. Therefore, we find that the netting of injec-

tions against withdrawals for purposes of determining the injection volumes to be placed in Priority 2 should be confined to

the May through October season during which, historically, the preponderance of storage injection is most likely to occur.[8] We also find that safeguards are needed to assure that injections afforded Priority 2 treatment will in fact be used to protect high priority loads, that is, Priority 1 and 2 loads that must be protected because of the safety risks associated with curtailment of small volume temperature-sensitive customers, and because of the need to maintain deliveries to consumers in Priority 2 where alternative fuel capability cannot be developed.

The determination of the appropriate volumes of injection gas to be placed in Priority 2 shall be made as hereafter described. El Paso shall obtain from its customers the volumes attributable to injections for storge purposes after netting out withdrawals from storage during the period May 1, 1974 to October 31, 1974.

El Paso shall then apply the end-use profiles of its customers to whom net injection volumes were delivered in order to compute the portion of such net injection volumes to be placed in Priority 2. In our view the most equitable method for arriving at this percentage is through the comparison of Priority 1 and 2 sales to total sales in all priorities for the November 1 through April 30 storage withdrawal period as set forth in the customer's end use profile. Net injection volumes receiving Priority 2 treatment will therefore represent the Priority 1 and 2 proportion of a storage customer's total storage injections,

[8]See footnote *4, supra.*

in the same ratio that sales in Priority 1 and 2 for the winter season bear to his total sales in all priorities for the winter season.

It should be noted in connection with our discussion of storage that San Diego Gas and Electric Company

(San Diego) and others object to our determination in Opinion No. 697 that storage should be considered as an independent source of supply in determining a storage customer's entitlement from El Paso:

> "The Commission's action in considering storage as a separate source of supply will result in even further taking of California supplies of natural gas for the benefit of E-O-C customers. The Commission not only fails to allow credit for investment in storage and peakshaving facilities, it penalizes those which have developed such facilities. The treatment of storage withdrawals as a separate source of supply constitutes an unreasonable preference in favor of those without such facilities." (Application for rehearing, p. 2)

We find this argument unpersuasive, particularly in view of the benefits which customers with storage capability will derive with respect to the high priority accorded to a portion of storage injection requirements. Furthermore, we find no reason to depart from our prior finding that for purposes of computing curtailment, El Paso's share of a customer's market, at any particular point in time, is directly proportional to the volumes delivered by El Paso to the total requirements of the customer's market.

In our view, this curtailment plan will not act as a deterrent to the development of any new storage or peakshaving nor to the acquisition of natural gas supplies from other sources. Furthermore, customers who plan to develop such additional supplies will neither be penalized nor preferentially treated as a result of the operation of this curtailment plan. In the first place, we have prescribed base volumes reflecting actual historical takes plus adjustments for the takes of recently attached

customers in Priority 1 and 2. These base volumes are independent of a customer's existing and future alternate natural gas supply sources, his storage, or his peakshaving capability. Second, the end-use profiles established herein will reflect a customer's use of alternate supply sources, storage or peakshaving in the historical period upon which the end-use profile is based. Neither the base volumes nor the end-use profiles will be revised until further order of the Commission. Third, the seasonal volumetric entitlement of each customer will vary in accordance with variations in the degree of El Paso's gas supply deficiency. Therefore, the extent of a customers seasonal entitlements from El Paso is not linked to nor dependent upon any increase or decrease in the customer's alternate gas supply sources, his storage, or his peakshaving capability.

Salt River Power District has requested clarification of the treatment to be accorded El Paso's own underground storage. El Paso's own storage is operated as a source of system supply in winter and as a company-use requirement in the summer when injections are made. Requirements for storage injection are deducted from El Paso's gross flowing supply to determine supply available for

sale to its customers. Thus storage injection requirements are met before gas is sold. The relatively small amount of storage capability controlled by El Paso, in relation to the size of Priority 1 requirements, mandates that El Paso maintain maximum inventories in its storage to maintain flexibility to meet emergency needs of Priority 1 markets.

Definitions

The various filing on rehearing indicate that confusion exists with respect to the definitions adopted in Opinion No. 697 which are to be applied in determining the priority classification of particular end uses. Certain parties including El Paso construe Opinion No. 697 as

adopting certain definitions contained in the tariff filed by El Paso pursuant to our orders establishing an interim plan for El Paso.[9] However, it was our intention in Opinion No. 697, based on the record evidence in this proceeding, to adopt definitions consistent with the uniform definitions prescribed in Order No. 493-A, Docket No.474, issued October 29, 1973.[10]

In reaching this conclusion, however, we were cognizant of the fact that Order No. 493-A was issued after the closing of the record in this proceeding. It has therefore not been applied retroactively here. Rather we have examined the evidence in the record before us and have concluded, for the reasons stated hereafter, that no factual circum-

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[9] Substitute Second Revised Sheet No. 61 and Third Revised Sheet No. 62 of El Paso's FPC Gas Tariff, Original Volume No. 1.

[10] Order No. 493-A, clarifying and amending Order No. 493, Order Adopting Certain Definitions To Standardize End Use Classifications, issued September 21, 1973 pursuant to the notice of proposed rulemaking issued March 26, 1973 in Docket No. R-474.

stances are evident in this record which indicate that the interests of the parties hereto would be prejudiced by the adoption of the definitions in Order No. 493-A, particularly in view of the compelling public interest in developing uniform definitions throughout the gas industry to avoid any undue discrimination or preference among ultimate consumers as the result of implementation of end-use curtailment programs. It should also be noted that a number of the definitions in El Paso's interim plan tariff are not materially different from those adopted in Order No. 493-A and are not disputed by the parties.

The Order No. 493-A definitions of "residential," "commercial" and "industrial" service are more specific and provide a greater measure of guidance to the parties than the definitions of these services contained in El Paso's interim tariff. In fact, the tariff sheets filed by El Paso to comply with Opinion No. 697 contain definitions of "residential" and "industrial" service identical to those in Order No. 493-A. The definition of "commercial" service in the Opinion No. 697 compliance filing is likewise identical to its Order No. 493-A counterpart with the exception of the addition of the following statement:

> "This classification shall also include service to any party utilizing gas for irrigation pumping, for total energy systems at establishments engaged in commercial operations, or for uses associated with the production of oil and gas." [11]

The use of natural gas for irrigation pumping and for total energy systems was also included in El Paso's in-

[11] Section 11.1(b) of El Paso's proposed Third Revised Sheet No. 61, FPC Gas Tariff, Original Volume No. 1.

terim tariff definition for "Large Comercial Consumer" in the interim plan tariff [12]. The inclusion of uses associated with the production of oil and gas in the commercial category is before us for the first time in the Opinion No. 697 compliance filing.

[12] Section 11.1(d) of El Paso's currently effective Third Revised Sheet No. 62, FPC Gas Tariff, Original Volume No. 1.

As more fully explained hereafter, uses for irrigation pumping, total energy systems and oil and gas production should not be included in the definition of "commercial" service. In should also be noted that El Paso has attempted to include these uses in Priority 2 in the tariff sheets filed to comply with Opinion No. 697 [13] The same reasoning which warrants exclusion of these uses from the definition of "commercial" service applies to the elimination of these uses from Priority 2.

With respect to uses for irrigation pumping and total energy systems at commercial establishments, we find that the record as well as the posture of El Paso's current gas supply, as shown in its Form No. 16 Reports filed with the Commission, do not support continuation of a preference to these users. Irrigation pumping has not been shown to be a commercial use of natural gas but should instead be treated as an industrial use. Pumping operations, and agricultural activities generally, more closely fit the "industrial" definition, i.e., "service to customers engaged primarily in a process which creates or changes raw or unfinished materials into another form," as opposed to the "commercial" classification of customers "engaged primarily in the sale of goods or services." However, if a

[13] Section 11.2 of El Paso's proposed Second Revised Sheet No. 63-A, FPC Gas Tariff, Original Volume No. 1.

particular irrigation pumping use of natural gas involves a use for which alternate fuels are not technically feasible, and if otherwise consistent with the definition of "process gas," those requirements would qualify for inclusion in Priority 2 as "process gas."

Similarly, the inclusion of total energy requirements at commercial installations in the definition of "commercial" is not supported by record evidence. We find that the use of natural gas to provide basic raw energy needs of a large total energy commercial complex is much more closely associated with an industrial use of natural gas, and should be considered as such for purposes of curtailment. To the extent that total energy systems employ economy of scale concepts and provide central power facilities for many combined small individual commercial operations, they should be distinguished from individual commercial uses. We conclude therefore that total energy systems should be treated as industrial customers for purposes of implementing curtailment on the El Paso system.

The proposed tariff inclusion by El Paso of uses associated with the production of oil and gas in the definition of "commercial" service, as well as in Priority 2, is also found to be unsupported by the record and should be treated henceforth the same as all other industrial customers with similar end-uses. The production of oil and gas has not been demonstrated on this record to deserve any preference over other industrial uses of natural gas irrespective of the relative importance of energy production activities. However, as in the case of irrigation pumping, uses associated with oil and gas production for which alternate fuels are not technically feasible, and which are

otherwise consistent with the definition of process gas, may qualify as "process gas" for Priority 2 treatment.

In view of our determination in Opinion No. 697 that the confinement of curtailment to situations where alternate fuel already exists is not viable long term policy, a definition of the term "alternate fuel capability," as set forth in Order No. 493-A, should be included in El Paso's permanent curtailment plan tariff. In determining whether it is technically feasible for a customer

to convert to alternate fuels, it is essential that propane and other gaseous fuels be excluded from such determination, since as a purely technical matter, propane or some other gaseous alternate may be substituted for practically all natural gas uses. A definition which did not provide for the exclusion of such gaseous fuels would serve no useful purpose in that virtually no industrial consumers could qualify for exclusion.

The same rationale applies to the exclusion of propane and gaseous alternates in the Order No. 493-A definitions of "plant protection" or "process gas," inasmuch as the qualification of a particular use for inclusion in those definitions is dependent upon whether alternate fuels can be utilized.

As the Order No. 493-A definitions of "plant protection" and "process gas" are consistent with this concept of "alternate fuel capability," and, moreover, as these definitions are more precise and minimize the occurrence of differing interpretations among customers in reporting their respective requirements, these definitions should replace the interim plan tariff definitions of "plant protection" and "process gas." In this respect the proposed

tariff sheets filed by El Paso to comply with Opinion No. 697 contain definitions of "plant protection" and "process gas" which are identical to the Order No. 493-A definitions with the exception of added language in each which we find should be deleted. El Paso seeks to include under the definition "plant protection" those volumes of gas required to protect the human needs associated with the operation of the plant. We find nothing in the record to require such additional language. The Order No. 493-A definition of "plant protection" specifically provides for the protection of plant personnel which cannot be afforded through the use of alternate fuels. Further, a claim of Priority 1 protection is appropriate for volumes delivered to protect the residential needs of personnel residing at isolated industrial complexes.

El Paso likewise seeks to include in the definition of "process gas" such gas as is required for ignition fuel and flame stabilization in the generation of electric energy. A similar provision existed in the "process gas" definition of the interim plan tariff. The addition of these uses to the "process gas" definition may carry the implication that these uses merit special consideration within the "process gas" component of Priority 2. We find this language unnecesarsy, for if the requirements for ignition fuel and flame stabilization at particular electric generating stations are such that nongaseous alternatives are not technically feasible, the "process gas" definition would apply and Priority 2 status accorded thereby.

The definition of "feedstock" in El Paso's interim plan tariff is essentially the same as that in Order No. 493-A. To the extent that the Order No. 493-A definition is more precise, its adoption is favored here.

With regard to the inclusion of the definitions for "firm service" and "interuptible service" in El Paso's proposed tariff filed to comply with Opinion No. 697, we find no useful purpose in the retention of these definitions, especially in view of our decision in Opinion No. 697 to eliminate the "firm-interruptible" contract distinction for purpurposes of assigning priorities of curtailment.

The Order No. 493-A definition of "boiler fuel" which we have adopted in this proceeding contains reference to natural gas used to raise steam or generate electricity including use of gas turbines for the generation of electricity. Parties request rehearing of this definition since it represents a change from the treatment of gas turbine uses in the interim plan where the Commission found that these uses should not be included within boiler fuel requirem ats. The record here indicates that substantially large quantities of natural gas can be used at the same general power plant locations as fuel for turbines or as fuel in boilers to generate electricity. It also clearly indicates that alternate fuel capability can be developed for both applications. Since for practically all large steam plants the amount of energy used per kilowatt hour generated is much lower than for gas turbines, the relative efficiencies will compel consumption of available natural gas in boilers on days when turbine operation is not required.

As a practical matter, we cannot control the use of natural gas in electric generating boilers without including volumes available for use in gas turbines within the definition of boiler fuel use. The size of the requirement for gas turbine use and the uncontrollable opportunity to use the gas in boilers which are invariably located on or near

the gas turbine sites, compels us to include gas turbine needs in the lowest industrial curtailment priorities consistent with other similarly sized boiler fuel users.

This record does not indicate that industrial applications of gas turbines, other than for the purpose of electricity generation, provide an opportunity for incentive for the diversion of higher priority gas to boiler fuel use on a scale equivalent to that obtaining in the case of gas turbine utilization for electricity generation. These uses would be classified in the same priority as boiler fuel, however, where such uses provide opportunity or incentive for diversion.

Other Issues

APS contends that all small volume users, irrespective of their classification as residential, commercial or industrial should be placed in Priority 1, particularly in view of the difficulty in evaluating thousands of meters of this size.

The decision to curtail residential and small commercial consumers only after all other consumers have been curtailed is based for the most part, as noted in Opinion No. 697, on the safety risks inherent in curtailing service to the very large number of customers in the residential and small commercial categories. Small volume industrial consumers represent a proportionately much smaller group of users whose curtailment would pose either the logistical nor safety problems associated with curtailment in the residential and small commercial categories. Further, small-volume industrial consumption does not represent a use of gas for essential human needs or for the provision of essential human services which characterizes residential and small commercial consumption.

Since a just and reasonable permanent curtailment plan must provide for the possibility of curtailment in even the highest priority categories, it is necessary therefore to determine which high priority users are to be accorded maximum protection. Likewise, distributors must be prepared for such an eventuality regardless of the fact that it may entail considerable administrative inconvenience such as that envisioned by APS. This consideration was in part responsible for our decision not to accept as controlling the testimony of Southern Union's witness to the effect that loads below 200 Mcf per day are virtually non-curtailable.

As correctly surmised by El Paso, we inadvertently omitted reference to "peakday" volumes in describing the limitations on requirements in Priorities 4 and 5 in Opinion No. 697. Peakday volumes should constitute the limitations in Priorities 4 and 5 as reflected in the interim plan tariff and in El Paso's proposed tariff filed to comply with Opinion No. 697.

National Environmental Policy Act Compliance

Upon reconsideration, we have determined that a remand is necessary to comply with the procedural requirements of the National Environmental Policy Act (NEPA).[14] We have maintained the position in this and other curtailment proceedings that to comply with the procedural requirements of NEPA in curtailment cases would result in "the preparation of an impact statement devoid of meaningful content." (Opinion No. 697, Slip op. at 26)

As stated in Opinion No. 697 this position "derives from our knowledge that the degree of speculation necessitated

[14] National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

by such a prediction of future impact would, for the reasons expressed in our order of August 22, 1972, far exceed the standard of 'reasonable forecasting and speculation' found in the *Scientists' Institute for Public Information* decision,[15] supra, to be implicit in NEPA." (Slip op. at 26) (Footnote added)

However, recent court decisions indicate that this view of the applicability of NEPA procedural requirements to curtailment cases is not consistent with the NEPA Section 102[16] mandate that agencies will comply with

[15] *Scientists' Institute for Public Information, Inc.* v. *A.E.C.*, 481 F.2d 1079 (D.C. Cir. 1973).

[16] 42 U.S.C. 4332.

NEPA procedural requirements "to the fullest extent possible."[17]

We are therefore constrained to remand this proceeding for the limited purpose of preparation and circulation of an environmental impact statement in accordance with Section 102(2)(c) of NEPA. This step is taken in spite of our belief that the impact statement so developed will add little of substance to the environmental record already developed in this proceeding. We must likewise express our concern that this step will require a commitment of the resources of this agency of such magnitude that our ability to effectively and timely administer pipeline curtailments will be severely impaired.

The focus of the remanded proceeding below should be limited to the environmental impact of the permanent plan

[17] *e.g.*, *State of Louisiana, et al.* v. *F.P.C.*, No. 73-3478 (5th Cir., issued November 8, 1974) (Slip op. at 850-858); *American Smelting and Refining Co.* v. *F.P.C.*, 494 F.2d 925, 949 n. 47 (D.C. Cir. 1974).

found here to be just and reasonable in all other respects. The Presiding Judge shall be authorized to modify the plan as may be required by the environmental evidence there adduced. In the interim, we find that this record requires the implementation of the permanent plan pending the resolution of the environmental issues. It should therefore be considered as a revised interim plan until such time as the Commission rules on its appropriateness as a permanent plan for the El Paso system.

We believe our action is in accord with the mandate of the Circuit Court of Appeals in *American Smelting and Refining Co., supra*, as well as the 5th Circuit's ruling in *State of Louisiana, et al., supra*, to comply insofar as practicable with the NEPA requirement to circulate an appropriate environmental impact statement. At the same time the operation of the permanent plan cannot perforce be deferred until full review of the NEPA statement has been accomplished, since we are compelled by the Natural Gas Act to allocate our diminishing natural gas resources among all consumers to serve the public interest. *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). If such allocation of our natural gas resources could not be placed into effect until several years after the adoption of an equitable plan pending resolution of inevitable environmental controversies under NEPA, we would be squarely confronted with the doctrine of statutory impossibility to perform our primary function under the Natural Gas Act to efficiently and equitably allocate our natural gas resources. Our efforts to conserve natural gas would be to no avail while the judicial process ran its course.

The Commission further finds:

(1) El Paso's interim curtailment plan in Docket No. RP72-6, as prescribed in Opinion Nos. 634 and 634-A, and as extended by your order of October 18, 1973, except as modified by Opinion No. 697 to eliminate from Opinion No. 634-A the prohibition of grouping of delivery points, is just and reasonable for the period ending as of the effective date of this opinion.

(2) The assignments of error and grounds for rehearing or modification set forth in the various applications, petitions, and motions listed in Appendix A present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 697 and order issued June 14, 1974 except insofar as that opinion and order have been clarified above.

(3) This proceeding is remanded to the Presiding Administrative Law Judge for the limited purpose of adducing evidence with respect to the environmental impact of the proposed permanent plan established in Opinion No. 697 and order, as modified and clarified by this opinion. The Commission Staff is directed in the remanded proceeding to comply with the requirements of Section 102 (2)(c) of the National Environmental Policy Act of 1969. All requests for reopening the record for purposes other than receiving evidence with respect to the environmental impact of the proposed permanent plan are denied.

(4) The proposed tariff sheets submitted by El Paso pursuant to our Opinion No. 697 and order are rejected as not in compliance with Opinion No. 697 and order as modified by this opinion. El Paso shall file within 90 days of this opinion and order revised tariff sheets consistent

with the terms and conditions prescribed in Opinion No. 697 and order, as clarified and modified by this opinion.

(5) The modifications to El Paso's currently effective interim plan prescribed in Opinion No. 697 and order, as clarified and modified in this opinion, shall be implemented by further order of the Commission upon approval of the revised tariffs to be submitted by El Paso in compliance with paragraph (4) hereof and upon submittal by El Paso of the information required in paragraph (6) hereof.

(6) El Paso shall file with the Commission, within 90 days of this opinion and order, a report showing for each customer and for the system as a whole (1) the base volumes for the 12 month period ending October 31, 1972, adjusted for Priority 1 and 2 requirements as described above, (2) the Winter Season Base Volumes and Summer Season Base Volumes as described above, (3) the end-use profile as described above.

The Commission orders:

(A) This proceeding is remanded for the limited purpose described in finding paragraph (3) hereof.

(B) El Paso shall file within 90 days of this opinion and order revised tariff sheets consistent with the terms and conditions of Opinion No. 697 and order, as clarified and modified by this opinion.

(C) El Paso shall file within 90 days of this opinion and order the information described in finding paragraph (6) hereof.

(D) Except as heretofore provided, all requests and motions in the applications listed in Appendix A are denied.

By the Commission.
(SEAL)

Commissioner Moody, dissenting on limited issue, filed a separate statement appended hereto.

KENNETH F. PLUMB,
Secretary.

El Paso Natural Gas Company) Docket No. RP72-6

(Issued December 19, 1974)

MOODY, Commissioner, *dissenting* on limited issue:

I remain of the view, expressed in my dissent to Opinion No. 697, that interruptible service should be subordinate to firm service in prescribing a curtailment plan for El Paso.

I also note my reservations concerning our failure to take non-pipeline sources of supply into account, in this and in other curtailment cases. Though administration would be most difficult, a legally sufficient curtailment tariff may require differing treatment for full requirements and partial requirements customers.

On this system, the California customers of El Paso have access to gas from the offshore federal domain, and have pending proposals before us for imported LNG. In the future, consideration must be given to the policy ramifications of permitting California to deplete interstate onshore supplies while offshore supplies remain undeveloped, and while imported gas is being sought only for the

California market. The same considerations apply to the Atlantic seaboard states: they also seek what they perceive to be a fair share of gas produced elsewhere in the nation, while dedicating somewhat less than full efforts to achieve development of new supplies closer to home.

I do not believe we can dodge these problems for much longer. If shortages are to be shared equitably, equity will require an examination of energy development efforts—or the lack thereof—in assessing entitlements and allocations.

/s/ RUSH MOODY, JR.
Rush Moody, Jr., Commissioner

APPENDIX A

El Paso Natural Gas Company, Docket No. RP72-6
CHRONOLOGICAL LIST OF FILINGS

7-11-74 Application of Nevada Power Company for rehearing of Opinion No. 697.

7-12-74 Application of The Air Pollution Control District of The County of Los Angeles for rehearing, reconsideration and modification of Opinion No. 697 and accompanying order.

7-15-74 Application for rehearing of Opinion No. 697 by Pacific Gas and Electric Company.

7-15-74 Respondent's tariff sheets to its FPC Gas Tariff, Original Volume No. 1, Third Revised Volume No. 2 and Original Volume No. 2A.

7-15-74 Application for rehearing of Arizona Public Service Company of Opinion No. 697.

7-15-74 Petition of City of Willcox and Arizona Electric Power Cooperative, Inc. for rehearing of Opinion No. 697, motion for stay, and motion to reopen the record.

7-15-74 Application of Salt River Project Agricultural Improvement and Power District for rehearing of Opinion No. 697.

7-15-74 Petition for rehearing of Tucson Gas & Electric Company for the Purpose of Clarifying Opinion No. 697.

7-15-74 Application of American Smelting and Refining Company, et al. for rehearing and clarification of Opinion No. 697.

Docket No. RP-72-6

7-15-75 Application of Southern Union Gas Company for rehearing and motion for clarification or reconsideration.

7-15-74 Application for rehearing and reconsideration of Opinion No. 697 by Department of Water and Power of the City of Los Angeles and Southern California Edison Company.

7-15-74 Application of Southern California Gas Company for rehearing, reconsideration and modification of Opinion No. 697 and accompanying order.

7-15-74 Application of San Diego Gas & Electric Company for rehearing and motion for clarification of Opinion No. 697 and accompanying order.

7-15-74 Application of El Paso Natural Gas Company for rehearing and motion for clarification of Opinion No. 697 and accompanying order.

7-16-74 Application for rehearing of the People of The State of California and the Public Utilities Commission of The State of California.

7-22-74 Motion of General Motors Corporation for leave to answer petition of City of Willcox and Arizona Electric Power Cooperative, Inc. for rehearing for the limited purpose of correcting a misstatement of fact.

7-30-74 Answer of General Motors Corporation to motions of City of Willcox and Arizona filed 7-15-74.

8-6-74 Protest of General Motors Corporation of Proposed tariff sheets tendered for filing by El Paso Natural Gas Company.

8-7-74 Reply to answer opposing motion of City of Willcox and Arizona Electric Power Cooperative, Inc. for stay and to reopen the record.

Docket No. RP72-6

8-9-74 Protest of Nevada Power Company against proposed tariff sheets tendered for filing.

8-20-74 Answer of Salt River Project Agricultural Improvement and Power District to applications for rehearing of Opinion No. 697.

8-23-74 Response of Southern California Edison Company in opposition to protest of General Motors Corporation of proposed tariff sheets tendered for filing by El Paso.

10-9-74 Response of El Paso Natural Gas Company to protests of General Motors Corporation and Nevada Power Company filed 8-9-74 and 8-23-74.

11-4-74 Protest of Southern California Edison Company to response of El Paso Natural Gas Company to protests of General Motors Corporation and Nevada Power Company.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

NATURAL GAS ACT

MARCH 1, 1974

* * * * *

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and

regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company [18] or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; [18] and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make

[18] Subsection 4 (e) was amended May 21, 1962 by Public Law 87-454, 87th Congress, 2d Session [S. 1595], 76 Stat. 72.

such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

NATURAL GAS ACT

MARCH 1, 1974

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U. S. C. § 717d]

APPENDIX G

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

NATURAL GAS ACT

MARCH 1, 1974

* * * * *

REHEARING; COURT REVIEW OF ORDERS

SEC. 19 (a) "Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

(b) * Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States [10] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional

* The Act of August 28, 1958 (72 Stat. 941 at 947) added the last sentence to subsection (a) and, in the second sentence of subsection (b), substituted "Transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for "certify and file with the court a transcript of" inserted "as provided in section 2112 of title 28, United States Code", and, in the third sentence, substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

[10] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U. S. C. § 717r]